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O'CALLAHAN OVERSEAS: A RECONSIDERATION OF MILITARY JURISDICTION OVER SERVICEMEN'S NON-SERVICE RELATED CRIMES COMMITTED ABROAD

*CHRISTOPHER H. MILLS**

I. INTRODUCTION

WHILE disengaging its ground combat personnel from Southeast Asia, the United States has continued to maintain far-flung bases in which military authorities must oversee a system of justice whose problems are no longer confined to the maintenance of discipline. With charges ranging from rape and murder to unauthorized absence, members of American forces stationed outside the United States territorial limits were alleged to have committed 34,837 offenses during the year ending November 30, 1970.[1] These crimes, although also cognizable in local foreign courts under traditional international law, could have been charged and tried by American military courts-martial.

While numerous voices are being raised against the unfairness of the military justice system,[2] few are to be heard protesting military jurisdiction over non-service connected offenses committed by American servicemen overseas. Yet the Supreme Court has been narrowing military jurisdiction for over a decade. Where civilian employees and dependents accompanying the armed services abroad could once be subjected to military jurisdiction, they can today be tried only by local foreign courts.[3] Honorably discharged servicemen are equally clear of military jurisdiction for crimes they have committed while on active duty.[4]

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1. Senate Comm. on Armed Services, Operation of Article VII, NATO Status of Forces Treaty, S. Rep. No. 92-695, 92d Cong., 2d Sess. 4 (1972) [hereinafter cited as NATO Report].

2. See, e.g., Bayh, The Military Justice Act of 1971: The Need for Legislative Reform, 10 Am. Crim. L. Rev. 9 (1971); Gaynor, Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article, 22 Hast. L.J. 259 (1971); Sherman, Congressional Proposals for Reform of Military Law, 10 Am. Crim. L. Rev. 25 (1971). But see Moyer, Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant, 51 Mil. L. Rev. 1 (1971).

3. McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969); United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

4. United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

The latest step in the limitation of military jurisdiction occurred in *O'Callahan v. Parker*[5] in which the Supreme Court ruled that the "non-service connected" crimes of servicemen are triable only in civilian courts. However, *O'Callahan* has not changed the extent and orientation of military justice in all areas in which United States servicemen are found. Thus far, it has not precluded military jurisdiction over non-service related crimes committed by servicemen overseas.[6] In fact, it has been argued that the thrust of the decision and the practical problems which would accompany its application overseas should lead courts to retain a broad military jurisdiction over *all* types of crimes committed overseas by servicemen.[7] This view now seems open to question in light of recent interpretations given *O'Callahan* by the circuit courts.[8]

It is the premise of this article that cases involving non-service connected crimes committed by servicemen abroad should not be excepted from the reach of *O'Callahan v. Parker*. The article will therefore analyze the interpretations of *O'Callahan* which deny its applicability to cases arising overseas, and attempt to assess their validity. It will also try to predict the effects of the suggested reinterpretation of *O'Callahan*.

II. The Meaning of *O'Callahan*

In July 1956, Sergeant O'Callahan left Fort Shafter, Oahu, Hawaii, on an evening pass in civilian clothes. Before the end of the evening, he was charged with breaking into a young girl's hotel room, assaulting and attempting to rape her.[9] O'Callahan was duly convicted by an Army general

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5. 395 U.S. 258 (1969). For an analysis of O'Callahan v. Parker, see Birnbaum & Fowler, O'Callahan v. Parker: The Relford Decision and Further Developments in Military Justice, 39 Fordham L. Rev. 729 (1971); Birnbaum & Fowler, Military Appellate Decisions Following O'Callahan v. Parker, 38 Fordham L. Rev. 673 (1970).

6. See generally Blumenfeld, Court-Martial Jurisdiction over Civilian-Type Crimes, 10 Am. Crim. L. Rev. 51, 72 (1971).

7. Note, Military Law—Military Jurisdiction over Crimes Committed by Military Personnel Outside the United States: The Effect of O'Callahan v. Parker, 68 Mich. L. Rev. 1016 (1970). This article, written before any civilian court could hear the issue, and only a few months after the Court of Military Appeals first heard the question, does not consider whether O'Callahan was concerned with subject-matter jurisdiction.

8. See United States ex rel. Flemings v. Chafee, 458 F.2d 544 (2d Cir.), cert. granted sub nom. Warner v. Flemings, 407 U.S. 919 (1972) (No. 71-1398, 1972 Term), discussed at text accompanying notes 62-73 infra; Schlomann v. Moseley, 457 F.2d 1223 (10th Cir. 1972), discussed at text accompanying notes 79-80 infra; Gosa v. Mayden, 450 F.2d 753 (5th Cir. 1971), cert. granted, 407 U.S. 920 (1972) (No. 71-6314, 1972 Term), discussed at text accompanying notes 74-78 infra.

9. 395 U.S. at 260.

court-martial[10] and sentenced to confinement at hard labor for ten years, forfeiture of all pay and allowances, and a dishonorable discharge.

O'Callahan unsuccessfully appealed his conviction through normal military and civilian review channels[11] until his petition for certiorari was granted by the United States Supreme Court on the limited question:

> Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 *et seq.*, have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by petit jury in a civilian court?[12]

The Court held that the military judicial system did not have jurisdiction to try servicemen accused of crimes lacking a "service connection":

> We have concluded that the crime to be under military jurisdiction must be service connected, lest "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers.[13]

Taking this reference to the procedural deficiencies of courts-martial as their key, many lower court judges have assumed that the military's lack of jurisdiction in *O'Callahan* stemmed from the military's failure to accord a defendant the civilian rights of indictment and trial by jury.[14] Because of the near unanimity of this interpretation, there has been little critical analysis of the applicability of *O'Callahan* to overseas courts-martial. In-

10. O'Callahan was convicted of violating articles 80, 130 and 134 of the Uniform Code of Military Justice [hereinafter cited as U.C.M.J.]. U.C.M.J. art. 80, 10 U.S.C. § 880 (1970) (attempts-attempted rape); id. art. 130, 10 U.S.C. § 930 (1970) (housebreaking); id. art. 134, 10 U.S.C. § 934 (1970) (non-capital crimes and offenses).

11. The Court of Military Appeals rejected his arguments in United States v. O'Callahan, 16 U.S.C.M.A. 568, 37 C.M.R. 188 (1967). A United States district court summarily dismissed his habeus corpus petition, United States ex rel. O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966), and its decision was affirmed by the Court of Appeals for the Third Circuit. 390 F.2d 360 (3d Cir. 1968).

12. O'Callahan v. Parker, 393 U.S. 822 (1968).

13. 395 U.S. at 272-73 (footnote omitted). In 1971, O'Callahan brought suit in the Court of Claims for his back pay. The court dismissed the action and ruled that the Board For Correction of Military Records was acting lawfully when it made his mandated honorable discharge retroactive to the time of reenlistment. The court further held that O'Callahan's actions were barred by the statute of limitations even though his conviction was invalidated more than six years after the date of the retroactively dated discharge. O'Callahan v. United States, 451 F.2d 1390 (Ct. Cl. 1971).

14. See, e.g., Mercer v. Dillon, 19 U.S.C.M.A. 264, 265, 41 C.M.R. 264, 265 (1970), discussed at text accompanying notes 44-57 infra; United States v. Keaton, 19 U.S.C.M.A. 64, 65, 41 C.M.R. 64, 65 (1969), discussed at text accompanying notes 97-109 infra.

stead, most cases in which court-martial jurisdiction over concededly non-service connected offenses committed outside the United States has been challenged have turned on the non-availability in foreign local courts of the procedural safeguards guaranteed by the United States Constitution.[15]

However, the Supreme Court in *O'Callahan* did not clearly state its reasons for holding that military courts lacked jurisdiction to try non-service related crimes. It is quite possible that the decision rested not so much on the lack of grand and petit jury proceedings in military courts as on those courts' lack of power over the subject matter, and over the person accused of committing non-service connected crimes.[16] In other recent decisions, the Court has ruled that courts-martial may not try certain classes of persons because of a lack of subject matter jurisdiction. It has held that article I, section 8, clause 14[17] does not allow Congress to grant court-martial jurisdiction in peacetime over persons not actually in the armed forces. The Court has specifically excluded civilian dependents,[18] employees of the armed forces abroad,[19] and honorably discharged servicemen[20] from the jurisdiction of the military courts. In each of these decisions, the Court talked, as it did in *O'Callahan*, of the preferability of indictment and trial by jury.[21] Nevertheless, each holding ultimately rested on the courts-martial's lack of subject matter jurisdiction because of an absence of congressional power to grant it.

For example, in *United States ex rel. Toth v. Quarles*,[22] where the Supreme Court ruled that ex-servicemen were not subject to military jurisdiction, Justice Black analyzed the reasons for and the values of a jury trial,[23] but stated that the Court's ruling rested on a narrow reading of the

15. See Hemphill v. Moseley, 313 F. Supp. 144, 145 (D. Kan. 1970), aff'd, 443 F.2d 322 (10th Cir. 1971), discussed at text accompanying notes 133-40 infra; Bell v. Clark, 308 F. Supp. 384, 389 (E.D. Va. 1970), aff'd, 437 F.2d 200 (4th Cir. 1971), discussed at text accompanying notes 111-32 infra.

16. This interpretation was favored by federal courts of appeal in at least three recent decisions. See United States ex rel. Flemings v. Chafee, 458 F.2d 544 (2d Cir.), cert. granted sub nom. Warner v. Flemings, 407 U.S. 919 (1972) (No. 71-1398, 1972 Term), discussed at text accompanying notes 62-73 infra; Schlomann v. Moseley, 457 F.2d 1223 (10th Cir. 1972), discussed at text accompanying notes 79-80 infra; Gosa v. Mayden, 450 F.2d 753 (5th Cir. 1971), cert. granted, 407 U.S. 920 (1972) (No. 71-6314, 1972 Term), discussed at text accompanying notes 74-78 infra.

17. U.S. Const. art. I, § 8, cl. 14 provides: "[The Congress shall have the Power] [t]o make Rules for the Government and Regulation of the land and naval Forces."

18. Reid v. Covert, 354 U.S. 1 (1957).

19. McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).

20. United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

21. See text accompanying notes 22-31 infra.

22. 350 U.S. 11 (1955).

23. Id. at 16-19.

article I power of Congress.[24] The analysis of the advantages of the jury system is closely paralleled in *O'Callahan*.[25] While Justice Douglas' opinion in *O'Callahan* did not clarify whether the lack of military jurisdiction of which it spoke resulted from Congress' lack of power to make rules or from procedural deficiencies, Justice Black's carefully chosen words in *Toth*[26] indicate that the *Toth* ruling was based on the former rationale. The *O'Callahan* Court, which noted that article I, section 8, clause 14 of the Constitution "need not be sparingly read in order to preserve [the] important constitutional guarantees [of indictment and trial by jury],"[27] seems to have based its decision on reasoning very close to that expressed by Justice Black in *Toth*.

In *Reid v. Covert*,[28] where civilian dependents of servicemen were excluded from military jurisdiction, Justice Black expressed the Court's concern for civilian dependents' rights of indictment and trial by jury.[29] However, as in *Toth*, the basis of the Court's ruling was the fact that Congress did not have the power, under clause 14, to subject this class of persons to the procedurally deficient court-martial jurisdiction.[30]

It is certainly arguable that the *O'Callahan* decision, like *Toth* and *Covert*, was not merely an administrative choice in favor of a court system better able to protect a defendant's fifth and sixth amendment rights. Rather, it can be seen as an actual denial of subject matter jurisdiction to the military in a certain class of cases. The scant mention of Congress' article I, section 8, clause 14 powers in *O'Callahan* does not necessarily invalidate this interpretation. As Justice Frankfurter pointed out in his

24. Id. at 23.

25. Compare id. at 16-19 with O'Callahan v. Parker, 395 U.S. at 262-65. Justice Douglas quoted extensively from Toth.

26. "[T]he power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces. There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction . . . necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals." 350 U.S. at 15. Justice Reed in his Toth dissent explained the majority's action by noting: "The Court finds a 'compelling reason' for construing the clause for Army regulation [art. I, § 8, cl. 14] more narrowly than has been done by the Congress and the Executive for many years. This is that trial by Article III judges and juries offers safeguards to military offenders superior to those offered by courts-martial." Id. at 34. Justice Reed argued that courts which interpret clause 14 should do so without regard to their preferences between military and civilian systems. Whether greater procedural safeguards are offered in one is irrelevant to the powers granted Congress.

27. 395 U.S. at 273.

28. 354 U.S. 1 (1957).

29. Id. at 5-10.

30. Id. at 19-22.

concurring opinion in *Covert*, no one element of the Constitution should be excluded or considered exclusive authority for a decision:

> For, although we must look to Art. I, § 8, cl. 14, as the immediate justifying power, it is not the only clause of the Constitution to be taken into account. The Constitution is an organic scheme of government to be dealt with as an entirety. A particular provision cannot be dissevered from the rest of the Constitution.[31]

Thus, the stated absence of a guarantee of indictment and trial by jury was not necessarily the Supreme Court's only consideration in *O'Callahan*, especially if it is read in light of the more thorough discussions of the Court in *Covert* and *Toth*. The unarticulated premise of *Toth*, *Covert* and *O'Callahan* is the same: namely, that a civilian trial is so superior to a court-martial that any argument addressed to military necessity would be insufficient to justify a broad reading of clause 14 under the "necessary and proper" clause.[32] Congress, therefore, lacks the power to make such persons or crimes cognizable by courts-martial. A common unfavorable attitude toward military justice pervades the opinions,[33] and the common theory of a lack of traditional subject matter jurisdiction can be seen in them all.

The lower federal courts, both civilian and military, which have attempted to interpret *O'Callahan* have, for the most part, viewed the decision not as a denial of subject matter jurisdiction to the military in a certain class of cases, but rather as an expression of the Supreme Court's preference for trial of these cases in civilian courts, where fifth and sixth amendment rights are not denied to defendants. In cases involving petty offenses,[34] retroactivity,[35] and, in particular, overseas crimes,[36] the courts have used this rationale to deny relief to current and dishonorably discharged servicemen who had framed their defenses in terms of *O'Callahan*.[37]

The Court of Military Appeals held in *United States v. Sharkey*[38] that military jurisdiction exists where the accused is charged with an offense

31. Id. at 44.

32. U.S. Const. art. I, § 8, cl. 18: "[The Congress shall have Power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." See Justice Black's conjunctive reading of the two clauses. 354 U.S. at 19-30.

33. But see Relford v. Commandant, 401 U.S. 355 (1971), in which the Court distinguished O'Callahan because it considered the on-base crimes of the serviceman-defendant service related. This case seems to be somewhat of an about-face by the Court, in that the opinion was completely devoid of comments criticizing courts-martial and military law. Relford cannot be seen as an expansion of military jurisdiction, but it does mark a point beyond which the Court will not venture to limit military jurisdiction.

34. See notes 38-43 infra and accompanying text.

35. See notes 44-60 infra and accompanying text.

36. See notes 97-156 infra and accompanying text.

37. But see notes 62-80 infra and accompanying text.

38. 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969).

for which, in a civilian court, he would have no constitutional right to a jury trial. The court noted that *O'Callahan* ought to be read "not by rote, but with an eye to the important constitutional protections which it sought to preserve to the soldier-accused,"[39] namely, the benefits of indictment and of trial by jury. The court reasoned that the Supreme Court had never required jury trials for offenses in which the maximum penalty would be less than six months.[40] Quoting a comment of Justice Douglas in *O'Callahan* out of context, the court noted that the " 'catalogue of cases put within the reach of the military is indeed long,' "[41] and upheld jurisdiction over the defendant's non-service related crime of being drunk and disorderly in uniform in a public place. The only inquiry made by the court was whether the accused would have been given indictment and trial by jury in civilian courts.[42] Since the defendant would have had no rights to these benefits in a civilian court, there was no bar to the military's retention of jurisdiction.[43]

More detailed analyses have been given by the Court of Military Appeals on the issue of *O'Callahan*'s retroactive application. In *Mercer v. Dillon*,[44] the court recognized that the retroactivity of *O'Callahan* would turn on the meaning of the Supreme Court's use of the term "jurisdiction" in *O'Callahan*.[45] As the court pointed out, traditionally, lack of subject matter jurisdiction voids a conviction.[46] If the basis of *O'Callahan* was the military's lack of subject matter jurisdiction over non-service related cases, asked the court, would "this necessarily change the pronouncements in *Linkletter v. Walker* that the Constitution neither prohibits nor requires retrospective effect?"[47] The court in *Mercer* never had to reach this question because it interpreted *O'Callahan* not as a denial of subject matter jurisdiction to courts-martial, but as an extension "to members of the armed forces in some circumstances [of] constitutional rights of grand jury indictment and trial by petit jury."[48] Further support for this interpretation of *O'Callahan* was found by referring to the reasoning of the

39. Id. at 27, 41 C.M.R. at 27. It would seem that such a reading might encourage re-examination of the fact that considerations of prior convictions may permit a court-martial to award a bad conduct discharge, even for such a petty offense. Can any offense punishable by such a stigmatizing discharge be termed petty?

40. Id. at 28, 41 C.M.R. at 28.

41. Id. at 27, 41 C.M.R. at 27, quoting from 395 U.S. at 273.

42. 19 U.S.C.M.A. at 27-28, 41 C.M.R. at 27-28.

43. Id. at 28, 41 C.M.R. at 28.

44. 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970).

45. Id. at 265, 41 C.M.R. at 265.

46. Id. See, e.g., In re Bonner, 151 U.S. 242 (1894); Ex parte Siebold, 100 U.S. 371, 376 (1880).

47. 19 U.S.C.M.A. at 265, 41 C.M.R. at 265 (citations omitted).

48. Id.

Court of Military Review in *United States v. King*[49] that *O'Callahan* limited only the exercise of court-martial jurisdiction, and not its existence. However, this purported distinction has not been explained in any other decision. Since it followed that the defendant's conviction in *Mercer* was not void for lack of subject matter jurisdiction, the court proceeded to apply standard retroactivity tests,[50] which tended to favor prospective application.[51]

Judge Ferguson dissented, arguing that *O'Callahan* was a denial of Congress' power to include peacetime, non-service related offenses in the Uniform Code of Military Justice.[52] He argued that *O'Callahan* did not dictate that courts should merely compare the available alternative forums in terms of the availability of indictment and trial by jury. Judge Ferguson reasoned that *O'Callahan* must have been aimed at simple subject matter jurisdiction because, although O'Callahan was admittedly not given an indictment and trial by jury, he actually had had a constitutional right to neither under the applicable rulings of the Supreme Court.[53] Judge Ferguson contended that if the Supreme Court had relied exclusively on the issue of the availability to O'Callahan of indictment and trial by jury in an alternative forum

> [I]t would have affirmed, because his trial began some twelve years prior to May 20, 1968 [when the Court first ruled that states could not deny a jury trial in serious criminal cases]. Since it did not, it is obvious that the decision in *O'Callahan* rested exclusively on the lack of court-martial jurisdiction to try non-service-connected offenses.[54]

Judge Ferguson further contended that Congress exceeded its powers under article I, section 8, clause 14 when it provided for the trial of non-service related offenses "committed in areas where the civil courts of the United States are open and functioning . . . ."[55] It is unclear why Judge Ferguson

49. 40 C.M.R. 1030 (1969) (conviction for smuggling more than six pounds of marijuana into the United States).

50. 19 U.S.C.M.A. at 266, 41 C.M.R. at 266. As discussed by the Supreme Court in Stovall v. Denno, 388 U.S. 293 (1967), the factors to be considered in deciding retroactivity are: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Id. at 297.

51. 19 U.S.C.M.A. at 266, 41 C.M.R. at 266.

52. Id. at 272, 41 C.M.R. at 272.

53. Id. Judge Ferguson pointed out, for example, that in DeStefano v. Woods, 392 U.S. 631 (1968), the Supreme Court had refused to reverse convictions obtained in non-jury state trials prior to its decision in Duncan v. Louisiana, 391 U.S. 145 (1968), on May 20, 1968. 19 U.S.C.M.A. at 272, 41 C.M.R. at 272. Moreover, noted Judge Ferguson, the Court had consistently refused to apply the federal requirement of indictment by grand jury to the states. See, e.g., Beck v. Washington, 369 U.S. 541 (1962); Hurtado v. California, 110 U.S. 516 (1884).

54. 19 U.S.C.M.A. at 272, 41 C.M.R. at 272.

55. Id.

mentioned this delineation of the geographical area within which Congress is authorized to legislate. To read added meaning into Justice Douglas' comment that O'Callahan's crimes were committed "within our territorial limits, not in the occupied zone of a foreign country,"[56] would be to nullify Judge Ferguson's premise. Either the divestiture of military jurisdiction over non-service connected crimes is complete because Congress under all circumstances lacks the power to invest such jurisdiction under clause 14, or Congress lacks this power to legislate only when "civil courts are open and functioning." Under the latter interpretation, the *O'Callahan* Court would have merely expressed a preference for civilian over military courts, based on the relative availability of constitutional guarantees. In short, Judge Ferguson cannot have it both ways. His theory that *O'Callahan* spoke of a lack of subject matter jurisdiction precludes distinguishing offenses as to location. Under his interpretation of *O'Callahan*, jurisdiction should be lacking in areas where United States civilian courts are functioning just as surely as in those areas where they are not.[57]

In each of the "civilian court-martial cases,"[58] the denial of military jurisdiction was based on reasoning similar to that advanced by Judge Ferguson in *Mercer*. Indictment and jury trials were seen as important safeguards, but ultimately, ruled the Court, Congress lacked power under clause 14 to provide for trial of persons not "in the land or naval forces." The opinions of both Justices Black and Frankfurter in *Covert* made it clear that the commission of the offenses overseas—in areas where the civilian courts of the United States were not functioning—could not, through the "necessary and proper" clause, give Congress the power to declare such conduct illegal because of the special needs of the military.[59] Although it may be argued that the military's need to control servicemen is greater than its need to control civilians, the cases seem to stand for the proposition that whatever the level of necessity, it is no higher in those cases in which the individual is found abroad.[60]

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56. 395 U.S. at 273-74.

57. Whether there is more necessity and propriety in military jurisdiction overseas has never been decided, and has only been argued once. See text accompanying note 219 infra.

58. This general term has been commonly used by commentators to refer to McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

59. Reid v. Covert, 354 U.S. at 34-35 (Black, J.); Id. at 48-49 (Frankfurter, J., concurring).

60. "[In Toth] [w]e brushed aside the thought that 'considerations of discipline' could provide an excuse for 'new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.' We were therefore 'not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause.'" Kinsella v. United States ex rel. Singleton, 361 U.S. at 240 (citation omitted) (emphasis deleted).

Although the Supreme Court has thus far refused to clarify *O'Callahan* on the question of retroactivity, lower federal courts have been unable to avoid it. Their holdings on the issue of retroactivity are less relevant for the purposes of this article than the reasoning they have used in arriving at their conclusions.

Most civilian courts which have been faced with the problem of retroactivity have summarily dismissed the issue without an analysis of the meaning of *O'Callahan*.[61] The first significant retroactivity case was *United States ex rel. Flemings v. Chafee*,[62] which is the only case in either a military or a district court to hold *O'Callahan* retroactive. In so doing, the district court and the affirming Second Circuit adopted a "subject matter jurisdiction" interpretation of *O'Callahan*, which, if carried to its logical conclusion in analyzing overseas offenses, could lead to the unique result of abolishing courts-martial for non-service connected overseas crimes.

In *Flemings*, the court faced a fact pattern that is typical of petitions seeking to give retroactive effect to *O'Callahan*. Seaman Flemings was tried in 1944 by a court-martial for auto theft and absence without leave.[63] Because the former charge was held to be non-service connected,[64] the question of retroactivity was presented by his petition for an order to change his discharge to "honorable."[65] The district court was faced with the question of the meaning of the *O'Callahan* Court's references to lack of jurisdiction when the petitioner argued that his "court-martial had, under the holding of *O'Callahan v. Parker*, no subject matter jurisdiction,"[66] and that its decision that he was guilty was therefore void. The government's response to this direct attack upon the usual interpretation of *O'Callahan* was a strict reliance on past rulings: "When the Supreme Court spoke of lack of jurisdiction in *O'Callahan* it did not mean lack of power over the subject matter . . . ."[67]

Thus, the district court in *Flemings* was faced with two alternative

61. One of the briefest treatments of the nature of the jurisdiction mentioned in O'Callahan is found in Thompson v. Parker, 308 F. Supp. 904 (M.D. Pa. 1970), in which the Pennsylvania district court denied the habeus corpus petition of an incarcerated serviceman, ruling that O'Callahan warranted only prospective application. The court assumed that O'Callahan concerned a shift of jurisdiction away from military courts due to inadequate procedural safeguards. Without further analysis, the court applied the standard Linkletter tests for retroactivity and ruled against O'Callahan's retroactive application, since the court applied its version of the meaning of jurisdiction in O'Callahan without discussion.

62. 330 F. Supp. 193 (E.D.N.Y. 1971), aff'd, 458 F.2d 544 (2d Cir.), cert. granted sub nom. Warner v. Flemings, 407 U.S. 919 (1972) (No. 71-1398, 1972 Term).

63. 330 F. Supp. at 194.

64. Id. at 198.

65. Id. at 199-203.

66. Id. at 195 (citation omitted).

67. Id.

meanings of jurisdiction, and Judge Weinstein gave them the clearest definition they have received. Traditionally, the term "jurisdiction" has meant a simple lack of competence to adjudicate the subject matter concerned. Any judgment rendered by a court without subject matter jurisdiction is void.[68] As Judge Weinstein explained, a finding that a court lacks this "classic competence jurisdiction" means that the "type of case should go to a different kind of court . . . ."[69] On the other hand, the jurisdiction spoken of in *O'Callahan* has more frequently been interpreted in what Judge Weinstein referred to as its "secondary meaning": "[C]ourts have been said to lack jurisdiction not because they lacked adjudicatory power but because they failed to exercise their power in a proper manner."[70] A finding that a court lacks jurisdiction under this latter theory would be based on procedural deficiencies rather than on a simple lack of adjudicatory power. If these deficiencies are corrected, the court can regain jurisdiction. Judge Weinstein observed that the functional rather than the jurisdictional evaluation of *O'Callahan* has gained favor with some courts, but found that the language of the Supreme Court makes the applicability of that interpretation doubtful.[71]

In affirming the district court, the Court of Appeals for the Second Circuit[72] also questioned the validity of the view that *O'Callahan* concerned "functional" jurisdiction.[73] By then, this was no longer a novel position, since the Fifth and Tenth Circuits (although both denying retroactivity) had reached the same conclusion. In *Gosa v. Mayden*,[74] Judge Clark of the Fifth Circuit denied *O'Callahan* retroactive effect, but disagreed with a district court's view of that case as "functional," having been persuaded by Judge Weinstein's reasoning in *Flemings*.[75] Judge Clark noted that the *O'Callahan* "foundation, framework and structure" deny to Congress the power to grant military jurisdiction over crimes lacking military significance, and cognizable in a civilian court.[76] Although Clark held that the defendant in *O'Callahan* was in the same status as "a discharged serviceman, a civilian employed by the Armed Forces overseas, or a civilian accompanying the military service overseas,"[77] he would still save military

68. See note 46 supra and accompanying text.

69. 330 F. Supp. at 196.

70. Id. at 195.

71. Id. at 195-96.

72. 458 F.2d 544 (2d Cir. 1972).

73. Id. at 549-50.

74. 450 F.2d 753 (5th Cir. 1971), cert. granted, 407 U.S. 920 (1972) (No. 71-6314, 1972 Term), noted in 40 Fordham L. Rev. 939 (1972).

75. 450 F.2d at 757.

76. Id.

77. Id. (footnotes omitted).

jurisdiction either if civilian courts were unavailable, or if the crime were not cognizable there.[78] In *Schlomann v. Moseley*,[79] the Tenth Circuit also concluded, after citing Douglas' conclusions in *O'Callahan* without analysis, that *O'Callahan* spoke in terms of "adjudicatory power," but agreed with the *Gosa* court that this was not dispositive, again denying retroactivity.[80]

III. *O'Callahan* Abroad

A. *Status of Forces Agreements*

International law does not give a country special jurisdiction over its military forces permanently stationed in foreign countries in times of peace. Rather, each nation possesses "full and absolute" jurisdiction within its own territory unless it limits itself.[81] Such limitations have been accepted by most countries in which American troops are stationed.[82] Foreign countries which benefit from the protection afforded by American servicemen have agreed to allow the United States to retain varying degrees of sovereignty over its troops.

Three basic types of agreements exist. First, Americans serving in military assistance advisory groups are protected by Mutual Defense Assistance Agreements. These agreements generally provide that the sending state's troops will be considered a part of and under the control of the chief of its diplomatic mission to that country, and as such, will be given diplomatic immunity.[83] Although they typically deal with countries in

78. Judge Clark saw O'Callahan as deciding only where the crime may be charged, not whether the military had authority to try him at all. Id. at 759. Thus, even for this case which turned on "competence jurisdiction," retroactivity is not mandated. The Linkletter tests must be applied.

79. 457 F.2d 1223 (10th Cir. 1972).

80. Id. at 1226-27.

81. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812). See also United States v. Flores, 289 U.S. 137, 157-59 (1933). In the International Court of Justice's Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 9, Judge Moore, an American, remarked on the "well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in case of a denial of justice, must look to that law for his protection." Id. at 92 (dissenting opinion). The United States Supreme Court clarified a travelling American's position in Neely v. Henkel (No. 1), 180 U.S. 109 (1901) when it stated: "When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States." Id. at 123.

82. Fifty-six countries in which American troops are stationed have agreements governing the rights, status and other obligations of American forces.

83. Such agreements are in force between the United States and Belgium, Brazil, Cam-

which small contingents of American forces operate, a similar pact granting complete immunity from local jurisdiction is still in force between the United States and the Republic of Vietnam.[84]

Secondly, there are Mission Agreements. These agreements provide that servicemen and their families who are members of the military mission are to be governed by United States military law and discipline, and will be removed from the country at the request of the host state.[85] This type of agreement is also intended for countries containing few American troops.

Finally, where large numbers of American troops are stationed, Status of Forces Agreements (SOFA) are in effect.[86] These agreements make rather detailed divisions of jurisdiction over visiting servicemen between the country sending the troops and the country where they are stationed. Article VII of the Agreement for the North Atlantic Treaty Organization[87] is the model for all such treaties which the United States has concluded. This article sets forth detailed regulations on the classes of persons covered and the types of crimes cognizable in the different courts. Any offense which is not punishable under the laws of the host country, but which violates the sending state's law, is to be cognizable exclusively in courts of the sending state, provided that the offender is subject to the military law of the sending state.[88] The receiving or host state has exclusive jurisdiction over offenses which violate only its own laws, and not those of the sending state.[89] When conduct violates the laws of both states, the jurisdic-

bodia, Chile, China, Columbia, Congo, Denmark, Dominican Republic, Ecuador, Ethiopia, France, Germany, Guatemala, Haiti, Honduras, Indonesia, Iran, Italy, Japan, Laos, Libya, Netherlands, Nicaragua, Norway, Pakistan, Peru, Philippines, Portugal, Saudi Arabia, Senegal, Spain, Thailand, Uruguay, and Vietnam. See, for example, Military Assistance Agreement with Guatemala, June 18, 1955, [1955] 2 U.S.T. 2107, T.I.A.S. No. 3283.

84. Mutual Defense Assistance in Indochina, with France, Cambodia, Laos, and Vietnam, Dec. 23, 1950, [1952] 2 U.S.T. 2756, T.I.A.S. No. 2447. Thus, at the height of our commitment in Vietnam, we had over 500,000 "diplomats" fighting the war.

85. This type of agreement is currently in force between the United States and Argentina, Bolivia, Brazil, Columbia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Iran, Liberia, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. See, for example, the Agreement for the Establishment of a United States Army Mission to Bolivia, June 30, 1956, [1956] 2 U.S.T. 2033, T.I.A.S. No. 3605.

86. The model "SOFA" is that applicable to members of the North Atlantic Treaty Organization, consisting of Belgium, Canada, Denmark, France, Greece, Italy, Luxembourg, Netherlands, Norway, Portugal, Turkey, United Kingdom, United States and Germany. Similar agreements exist between the United States and Australia, Brazil, Republic of China, Ethiopia, Iceland, Japan, Korea, Libya, New Zealand, Philippines, Spain and the West Indies Federation. See North Atlantic Treaty—Status of Forces Agreement with Other Governments, June 19, 1951, [1953] 2 U.S.T. 1792, T.I.A.S. No. 2846 [herinafter cited as NATO-SOFA].

87. Id. art. VII.

88. Id. ¶ 2(a).

89. Id. ¶ 2(b).

tion is "concurrent." Paragraph 3(a)(i) of SOFA provides that within this category, the sending state is to have the "primary" right to try the offender for:

> (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
> (ii) offences arising out of any act or omission done in the performance of official duty.[90]

In all other situations, the receiving state has primary jurisdiction.

This division of jurisdiction is much more obvious on paper than in practice. When jurisdiction is concurrent, the authorities of the state not having primary jurisdiction may request the other state to waive its primary rights and "sympathetic consideration" is to be given to that request.[91] The United States has a policy of asking for waivers in all concurrent cases, and has succeeded in 81 percent of the cases worldwide, and in 92.4 percent of the cases in NATO countries.[92] However, where the government does not ask for a waiver, nothing in the Constitution prevents the military from turning a serviceman over to local authorities for trial.[93]

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90. Id. ¶ 3(a)(i)-(ii).

91. Id. ¶ 3(c). See Carlisle, Official Duty Certificates Under Status of Forces Agreements, 20 JAG J. 95, 96 (1966).

92. NATO Report 4. The typical process used by the United States has been illustrated recently in the series of discussions and agreements between the Greek Government and the United States. The provision for Greek "home port" facilities for Sixth Fleet servicemen and their families was preceded by an exchange of notes between the governments granting to the servicemen and their families the same status as that accorded NATO troops under the NATO-SOFA. Greece has given an automatic waiver of its priority of jurisdiction over all cases unless the case has "special significance." N.Y. Times, Oct. 8, 1972, § 1, at 13, col. 1. This same provision whereby the host country may "recall" its waiver within a certain period has been in effect in other countries and in NATO countries, but the waiver rate remains high. For an example of the possible friction which can arise when a government refuses to recall its waiver in "insignificant cases," see id., Sept. 24, 1972, at 20, col. 4. Prosecution of American sailors accused of robbing and beating an Athens taxi-driver was waived to American authorities, who decided against any action. In response, the Athens taxi-drivers threatened to refuse to carry American servicemen.

93. Wilson v. Girard, 354 U.S. 524 (1957). By applying the tests of SOFA's article VII, paragraph 3(a)(i), military authorities have been using at least a crude form of test for service connection ever since the inception of the treaties. Whether this type of criterion would suffice as an O'Callahan-type test overseas, should one be required, is an issue beyond the scope of this article. See Note, Military Law—Military Jurisdiction over Crimes Committed by Military Personnel Outside the United States: The Effect of O'Callahan v. Parker, 68 Mich. L. Rev. 1016, 1026 (1970).

B. *The Logic of the Cases*

1. Court of Military Appeals

The Court of Military Appeals was the first court to hear appeals arguing that the *O'Callahan* requirement of service connection should apply overseas as well as within the territorial limits of the United States. The court's first two opinions after *O'Callahan* concerning overseas, non-service related offenses gave short, one-phrase reasons for refusing to apply *O'Callahan*. In *United States v. Goldman*,[94] it held that the offense of possessing counterfeit military payment certificates in Vietnam was cognizable by a military court because it was committed in a zone of conflict. And, in *United States v. Weinstein*,[95] the court held that the marijuana offense with which the defendant was charged violated no American penal statutes having effect in Germany, and that *O'Callahan* was therefore "inapplicable."[96]

The Court of Military Appeals' only extensive treatment of the overseas applicability of *O'Callahan* occurred in *United States v. Keaton*.[97] Airman Keaton, stationed at Clark Field, Republic of the Philippines, was convicted by an Air Force court-martial of assaulting another airman with intent to commit murder.[98] After intermediate military appellate authorities affirmed his conviction, the Court of Military Appeals granted review to "determine the validity of the accused's conviction in light of the constitutional limitations on court-martial jurisdiction delineated in *O'Callahan v. Parker*."[99] Actually, the court found that the facts in *Keaton* evidenced the necessary service connection because the assault was against a fellow serviceman. Thus, it could have chosen to "leave the matter there."[100] However, because the court wanted to avoid future confusion over the rights of the Philippine government under SOFA to try a serviceman for a concurrent, non-service related offense, it decided not to defer judgment on the overseas applicability of *O'Callahan*.[101]

According to the Court of Military Appeals' interpretation of *O'Calla-*

94. 18 U.S.C.M.A. 516, 40 C.M.R. 228 (1969).

95. 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969).

96. Id. at 30, 41 C.M.R. at 30.

97. 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969). It should be remembered that Judge Ferguson, who argued that O'Callahan was more than a case centering on deprivation of indictment and jury trial in his 1970 dissent to Mercer v. Dillon, wrote the opinion in Keaton in 1969. For a discussion of Judge Ferguson's dissent in Mercer, see text accompanying notes 52-57 supra.

98. 19 U.S.C.M.A. at 65, 41 C.M.R. at 65.

99. Id. (citation omitted).

100. Id. at 67, 41 C.M.R. at 67.

101. Id.

han, the pertinent part of the Supreme Court's decision was its ruling that the court-martial lacked jurisdiction only because:

> [T]he offenses were committed off base in the civilian community, within our territorial limits and not in the *occupied* zone of a foreign country, were *cognizable in the civil courts which were open and functioning*, and the charged crimes were without military significance . . . .[102]

The court noted that the "all-pervading factor" behind the *O'Callahan* decision was the need to afford an accused serviceman "the benefits of indictment and trial by jury,"[103] unless his crime is service connected. It was the denial of article III and fifth and sixth amendment rights, reasoned the court, that had led the *O'Callahan* Court to find that the court-martial lacked jurisdiction. The military court also pointed out that the Supreme Court in *O'Callahan* had established the jurisdictional requirement that "the crime must be cognizable in the civil courts of the United States, either State or Federal, and that such courts be open and functioning."[104] Finally, the Court of Military Appeals took note of a "large number" of offenses which could not be punished under federal civilian criminal codes. It concluded that if *O'Callahan* were given extraterritorial effect, the military defendant could neither be returned to the United States for trial conforming to *O'Callahan* safeguards, nor tried by court-martial.[105] The serviceman would therefore be at the mercy of the foreign sovereign and would receive neither indictment nor trial by jury. The court read Congress clause 18 powers "in conjunction with the 'necessary and proper' clause"[106] and held that they are broad enough to encompass courts-martial of non-service related offenses committed in foreign countries.[107]

The clear fact is that, in terms of the availability of indictment and trial by jury, it is irrelevant whether an accused serviceman abroad is tried for non-service connected offenses by a military or a foreign court. In neither court would he receive the constitutional safeguards to which he would be entitled in a United States civil court. Since a defendant in a military trial does not have the benefit of indictment and trial by jury, and since no country other than the United States provides a court system with protections equal to those constitutionally required here,[108] the Court of Military

102. Id. at 65, 41 C.M.R. at 65.

103. Id.

104. Id.

105. The court cited United States v. Fox, 95 U.S. 670 (1878), for the proposition that Congress might not have power to make criminal such conduct as is typically charged in overseas courts-martial. 19 U.S.C.M.A. at 67, 41 C.M.R. at 67. Their doubts notwithstanding, bills have been introduced in Congress to do just that. See text accompanying note 253 infra.

106. 19 U.S.C.M.A. at 67, 41 C.M.R. at 67.

107. Id.

108. The court did not mention the possibility of a different result if the serviceman is

Appeals in *Keaton* apparently compared the safeguards available in military and in foreign civilian courts, and concluded that a trial by military authorities would be preferable.[109]

The Court of Military Appeals has dismissed other challenges to the subject matter jurisdiction of military courts over non-service connected crimes committed abroad,[110] and now seems disinclined to grant review in cases where this argument is raised.

2. Federal Civilian Courts

Civilian courts have been no less easily convinced that *O'Callahan* should apply to crimes committed by servicemen overseas. Their reasoning

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alleged to have committed the crime in a country providing some form of indictment and jury trial to all accused in its local civil courts. Would a serviceman stationed in England have still been amenable to military jurisdiction? For a discussion of whether foreign courts in general could operate to divest the military of jurisdiction under the "functional" interpretation of O'Callahan, see Williamson v. Alldridge, 320 F. Supp. 840 (W.D. Okla. 1970), discussed at text accompanying notes 169-82 infra; Note, Military Law—Military Jurisdiction over Crimes Committed by Military Personnel Outside the United States: The Effect of O'Callahan v. Parker, 68 Mich. L. Rev. 1016, 1039-43 (1970). It would seem that such a distinction would be viewed as far more individious and damaging to United States foreign policy than one between American and foreign courts in general.

109. 19 U.S.C.M.A. at 66, 41 C.M.R. at 66. When American servicemen are tried by foreign courts, Status of Forces Agreements provide that an American "trial observer" shall be present to insure that the defendant-serviceman receives proper safeguards. See, e.g., NATO-SOFA, art. VII, ¶ 9(g). Though the procedures may differ from American practice, the reports of these trained military lawyers confirm the extreme concern for fairness exhibited by foreign courts when trying American soldiers. Williams, An American's Trial in a Foreign Court: The Role of the Military's Trial Observer, 34 Mil. L. Rev. 1, 42 (1966). The Defense Department has even argued that servicemen tried by foreign courts are likely to be treated more leniently than they would be in a court-martial. N.Y. Times, Jan. 24, 1971, § 1, at 9, col. 1.

110. On the same day that it decided Keaton, the Court of Military Appeals also considered United States v. Higginbotham, 19 U.S.C.M.A. 73, 41 C.M.R. 73 (1969) (off-post murder of a German civilian); United States v. Stevenson, 19 U.S.C.M.A. 69, 41 C.M.R. 69 (1969) (murder in Germany of a Canadian soldier by an American soldier); and United States v. Easter, 19 U.S.C.M.A. 68, 41 C.M.R. 68 (1969) (allegedly non-service related crime committed in Germany). Judge Ferguson wrote the opinions in all of these cases. In each case, the court dismissed jurisdictional attacks based on O'Callahan, with the explanation that the military tribunal, once invested with jurisdiction, was authorized under the applicable SOFA treaty.

The only other reported cases in the military system in which defendants raised similar jurisdictional arguments were United States v. Blackwell, 19 U.S.C.M.A. 196, 41 C.M.R. 196 (1970) (unstated crime committed in Germany); United States v. Bryan, 19 U.S.C.M.A. 184, 41 C.M.R. 184 (1970) (negligent homicide in Germany); and United States v. Gill, 19 U.S.C.M.A. 93, 41 C.M.R. 93 (1969) (off-post robbery in Germany). The Court of Military Appeals' treatment of the defense in these cases was equally cursory.

has paralleled that of the Court of Military Appeals. In *Bell v. Clark*,[111] the issues of retroactivity and overseas application were presented to the United States District Court for the Eastern District of Virginia. This court refused to apply *O'Callahan* to the case of a soldier convicted of rape in Germany which, if committed in the United States, would have fallen under *O'Callahan*'s reach.[112] The court admitted that the facts in *Bell* were "strikingly similar to [*O'Callahan*],"[113] and added that the only difference between the two fact patterns was O'Callahan's presence in the United States Territory of Hawaii.[114] The district court conceded without analysis that pursuant to judicial guidelines the crime was non-service connected.[115]

In addition to arguing that the military court lacked subject-matter jurisdiction over the crime charged, the petitioner in *Bell* contended that he had been denied his procedural rights of indictment and trial by jury. Since these safeguards could only be given him in an American civil court, petitioner asked for a declaration that this was the only forum in which he could be tried.[116] The court phrased the question for analysis as "whether any constitutional rights of Bell were infringed upon by submitting him to trial by court-martial . . . ."[117] and reached a negative answer without ever considering whether *O'Callahan* might have dealt with more than the provision of procedural safeguards.[118]

Dismissing the factual similarities between *O'Callahan* and *Bell* as "only the beginning of a trial court's inquiry"[119] into the law of a case, the dis-

111. 308 F. Supp. 384 (E.D. Va. 1970), aff'd, 437 F.2d 200 (4th Cir. 1971). See 7 Tex. Int'l L.J. 319 (1972).

112. Pfc. Bell was stationed with the United States Army in Germany in 1965 when he allegedly raped a German national. Bell was apprehended by German police (who subsequently waived primary jurisdiction under SOFA) and turned him over to U.S. Army authorities. He was charged, tried and convicted following a guilty plea by a general court-martial under article 120 of the Uniform Code of Military Justice. At the time of the offense, Bell was off-duty, properly absent from the base and in civilian clothes. 308 F. Supp. at 385.

113. Id.

114. Id. at 388.

115. Id. at 385.

116. See id. and Brief for Appellant, Bell v. Clark, 437 F.2d 200 (4th Cir. 1971). On appeal, Bell argued the jurisdictional issue by trying to persuade the court that a construction limiting application to territorial crimes would be possible only if the framers of the Constitution had excepted not only "cases arising in the land or naval forces", but also "cases arising in foreign countries involving non-service connected offenses committed by members of the armed services." Id. at 10. Aside from the extreme prescience this would have demanded of the framers, it may be historically incorrect to argue that they intended to omit military jurisdiction over American servicemen abroad. See text accompanying note 246 infra.

117. 308 F. Supp. at 389.

118. Id.

119. Id. at 386.

trict court chose first to distinguish the cases where civilians had been removed from court-martial jurisdiction.[120] The court interpreted these decisions as aiming to protect civilians' rights to indictment and trial by jury, but stated that the cases were all based on "the threshold determination of Congressional power"[121] under article I, section 8, clause 14 of the Constitution. Conversely, said the court, *O'Callahan* dealt with "deprivation of constitutional rights as distinguished from an attack on congressional power."[122] The clause 14 power was "not contested" in *O'Callahan*, according to the *Bell* court, because "the ability to try O'Callahan in an atmosphere conducive to procedural safeguards was overbearing and in effect dissolved . . . court-martial jurisdiction."[123]

The *Bell* court also believed that the availability of an alternative American civilian court was crucial in *O'Callahan*.[124] While the off-post rapist in *O'Callahan* could have been tried in full accord with all constitutional rights in the United States territorial courts of Hawaii, no American civilian court was available to Bell in Germany. The court found significance in the Supreme Court's comment in *O'Callahan* that the "offenses were committed within our territorial limits"[125] as well as in the lack of jurisdiction of United States district courts over extraterritorial rapes.[126] Since, as a practical matter, Bell had no chance for a trial according him full constitutional safeguards, the court held that he lost nothing by being subjected to a court-martial which failed to grant the rights supposedly protected by *O'Callahan*.[127]

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120. Id. at 387.

121. Id.

122. Id.

123. Id. at 388.

124. Id. No reference was made to the discussion of clause 14 in O'Callahan, brief though it may have been. Judge Merhige did not treat the two meanings of jurisdiction as that term was used in O'Callahan. See United States ex rel. Flemings v. Chafee, 330 F. Supp. at 195, discussed in text accompanying notes 62-71 supra. His assumption was that the term jurisdiction as used in O'Callahan is unambiguous, reading the "functional" use of the term from the Court's statement that "it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights." 395 U.S. at 273.

125. 308 F. Supp. at 388, quoting 395 U.S. at 273.

126. 308 F. Supp. at 388.

127. Unlike Judge Ferguson, Judge Merhige did not doubt Congress' power to extend jurisdiction over crimes such as Bell's to district courts. He read 18 U.S.C. § 3238 as evidence that Congress can do so under article II, section 2, clause 2 of the Constitution. 303 F. Supp. at 388. But cf. United States v. Keaton, 19 U.S.M.C.A. 64, 67, 41 C.M.R. 64, 67 (1969). Judge Merhige recognized that denying military jurisdiction would have resulted in Bell's probable trial by a German court. Though he saw no constitutional violation, he would choose trial in United States courts if faced with making a choice of forum. 303 F. Supp. at 389.

The Fourth Circuit's unanimous opinion[128] affirming the district court expressed the same view that the "key to *O'Callahan*" is the availability of United States civilian courts to give the defendant an indictment and jury trial.[129] Citing *Keaton*, the circuit court noted that the crime was not committed in a venue where such courts function. Thus, it ruled, court-martial jurisdiction was not excluded.[130]

The Fourth Circuit believed that NATO-SOFA's purpose of assuring speedy trials of members of visiting armed forces who commit crimes in a "receiving State" can be furthered only if American military authorities punish the offender.[131] Moreover, the *Bell* court expressed its belief that any other procedure compelled by the court might damage the comity sought by the treaty by encouraging the host state to exercise its jurisdiction in a higher percentage of cases.[132] Why this would damage comity is unclear. If the concern of the court of appeals was for the deterrence of such crimes by speedy trials, it should make little difference whether the trial be by military or foreign civilian authorities. In fact, trials in the local courts could even improve relations with local residents because of their increased awareness of and participation in the prosecution of military offenders.

Nearly four months after the district court rendered its decision in *Bell*, a Kansas district court reached a similar conclusion in *Hemphill v. Moseley*,[133] and rejected the jurisdictional arguments raised by the dishonorably

128. 437 F.2d 200 (4th Cir. 1971).

129. Id. at 201.

130. Id. at 201-02. Unlike the district court, the Fourth Circuit discussed NATO-SOFA article VII, and held that it invested United States military courts with jurisdiction, that it was binding on all courts, and that it was constitutional. The court refused to find that the jurisdiction conferred upon courts-martial by the Agreement was subordinate to the jurisdiction of federal courts under 18 U.S.C. § 3238 (1970) which provides for the trial in specified courts of "offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district . . . ." The court pointed out that article III, section 2, clause 3 of the Constitution permits Congress to direct the location of trials for crimes "not committed within any State," and that in keeping with article III, Congress decided that servicemen should be tried wherever "United States military authorities are present to exercise jurisdiction." 437 F.2d at 202-03. Thus, the court in effect transformed the intended congressional choice of a trial's location into an apparent choice of forum in which to try the case.

131. 437 F.2d at 203.

132. Id. It seems equally probable that trial of civilians overseas has had as great a deterrent effect on civilians as would have trial by courts-martial, since military authorities have pointed to no sharp increase in the number of crimes committed by dependents and other civilians since they got their license to act free of possible court-martial jurisdiction.

133. 313 F. Supp. 144 (D. Kan. 1970), aff'd, 443 F.2d 322 (10th Cir. 1971). Hemphill was convicted by an Army general court-martial in 1966 at Mannheim, Germany, of wrongful appropriation of an automobile, assault with intent to commit rape, and unlawful entry. His crudely drawn petition for relief was treated as one for habeas corpus by the district court. 313 F. Supp. at 145.

discharged serviceman.[134] The *O'Callahan* limitations on jurisdiction were discussed in the framework of petitioner's contention that he was deprived of (1) his fifth amendment right to indictment, (2) his article III, section 2 and sixth amendment rights to trial by jury, and (3) his right to due process, equal protection and a fair trial.[135] Once again, the very argument made in an attempt to win a petitioner's freedom put his case at a disadvantage. The district court easily (and probably correctly) found that there was no practical way Hemphill could have been tried in an article III court.[136] By starting the court down that line of an analysis of *O'Callahan*, Hemphill lost the chance to urge the court to examine the real foundations of the decision.

On appeal, the Tenth Circuit Court of Appeals affirmed the district court's decision in *Hemphill*.[137] The appellate court found no merit in the petitioner's challenge to military jurisdiction, and stated that the fact that O'Callahan's crime occurred in Hawaii, whereas Hemphill's conduct was committed in Germany "sharply distinguishes the two cases."[138] In *O'Callahan*, the court pointed out, the defendant " 'could have been prosecuted in a civilian court,' "[139] while in *Hemphill*, this condition could not be fulfilled.

The court of appeals also distinguished the civilian court-martial cases on the ground that:

> [Their common rationale] hinges on a very different fact: . . . '[C]ourt-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times of both the offense and the trial.' . . . Thus there is no comfort in those decisions for Hemphill.[140]

Why the practical effect of such a holding should differ from the *O'Callahan* exclusion of specific crimes rather than persons was not fully explained by the court, or by other courts making the same distinction. Actually, the basis of both exclusions may be seen as a narrowing of military jurisdiction by removing a certain type of case.

In at least three other lower court cases, challenges to the subject matter jurisdiction of the military in overseas cases were raised and decided adversely to petitioning servicemen without a full analysis of the issues. In *Savage v. Parker*,[141] the petitioner urged the United States District Court

134. 313 F. Supp. at 145.

135. Id.

136. Id.

137. 443 F.2d 322 (10th Cir. 1971).

138. Id. at 323.

139. Id., quoting Relford v. Commandant, 401 U.S. 355, 356 (1971).

140. 443 F.2d at 324, quoting O'Callahan v. Parker, 395 U.S. at 267.

141. Unpublished Habeas Corpus No. 1118 (M.D. Pa., Mar. 3, 1970). Savage was convicted of a rape which allegedly occurred in Mannheim, Germany on June 6, 1967. He was sentenced to reduction, total forfeitures and 20 years confinement at hard labor.

for the Middle District of Pennsylvania to apply *O'Callahan* retroactively overseas. The district court disposed of the case by denying retroactivity, and thus refused to pass on the issue of *O'Callahan*'s application overseas. In *Swift v. Commandant*,[142] the Tenth Circuit Court of Appeals summarily rejected the jurisdictional argument that *O'Callahan* was "on all fours with the instant case,"[143] by relying on its earlier decision in *Hemphill v. Moseley*. Finally, in *Harris v. Ciccone*,[144] the Court of Appeals for the Eighth Circuit refused to speculate on the overseas applicability of *O'Callahan*, since the issue had not been raised in the court below.[145]

In *Gallagher v. United States*,[146] a dishonorably discharged serviceman sought to recover back pay on the ground that his overseas court-martial had been "invalid" under *O'Callahan*. The United States Court of Claims was not persuaded by the apparent factual similarity to *O'Callahan* and held that the commission of the crime overseas was a "distinction so signnificant that *O'Callahan* loses all authority."[147] In reaching this result, the court relied on relevant decisions of the Court of Military Appeals,[148] to which it devoted more extensive analysis than any court before or since, and on which it relied more than other civilian courts. The *Gallagher* court noted that the Court of Military Appeals had ruled in *Keaton* that service connection is simply not to be used overseas[149] because of its irrelevance in the case of a "violent crime in a friendly foreign country with which we have a Status of Forces Agreement."[150] The court found that a denial of

142. Unpublished District Court Opinion, aff'd, 440 F.2d 1074 (10th Cir. 1971). Swift was convicted of unpremeditated murder while stationed as an airman in Germany.

143. 440 F.2d at 1075. See text accompanying notes 137-40 supra.

144. 417 F.2d 479, 488 (8th Cir. 1969), cert. denied, 397 U.S. 1078 (1970). Harris was convicted by a court-martial in 1950 of the murder of a German civilian, unlawful entry of a German dwelling with intent to commit robbery, and assault, with intent to rob, against a German national. He was sentenced to forfeitures, a dishonorable discharge and 25 years confinement at hard labor. 417 F.2d at 480-81.

145. 417 F.2d at 488. The district court opinion may be found at 290 F. Supp. 729 (W.D. Mo. 1968).

146. 423 F.2d 1371 (Ct. Cl.), cert. denied, 400 U.S. 849 (1970). Private Gallagher was arrested by German police on suspicion of assaulting and robbing a German civilian while off-post, on leave and in civilian clothes. He was subsequently turned over to American military authorities, charged and convicted by a general court-martial. After completion of his sentence and execution of a dishonorable discharge, he sued in the Court of Claims to recover back pay lost by reason of the invalid court-martial. 423 F.2d at 1372. For the military's anticipation of Gallagher, see Hearings on Operation of Article VII, NATO Status of Forces Treaty Before the Senate Armed Services Comm., 91st Cong., 2d Sess. 2 (1970).

147. 423 F.2d at 1373.

148. Id. at 1373, 1376, 1378. See text accompanying notes 94-110 supra.

149. See text accompanying notes 97-110 supra.

150. 423 F.2d at 1373. The court of appeals agreed with the government's argument that every crime committed by servicemen overseas is service connected, and that there is there-

military jurisdiction over "the commission of crimes of violence against local civilians by our servicemen in friendly foreign countries" would be a grave impairment to the military's "ability to perform its mission."[151]

The *Gallagher* decision can be seen in its best light after acknowledging its openly result oriented stance.[152] The court reasoned that to hold that *O'Callahan* divests the military of jurisdiction over non-service related crimes overseas would probably relegate any servicemen so accused to a foreign civilian court.[153] Thus, said the court, whenever a soldier challenges the jurisdiction of his court-martial, claiming a deprivation of his article III, section 2 and sixth amendment rights, he would immediately be deprived of whatever procedural safeguards he might have otherwise had in a court-martial and sent to a foreign court, where constitutional protections have no application: "[P]laintiff is asking us to exhibit our zeal for the Bill of Rights by holding that the protection of our Bill of Rights must be utterly withdrawn from servicemen stationed in foreign countries, whenever they are charged with offenses in the concurrent class."[154] Such a result plainly concerned the court.[155] Even though it refused to criticize the German judicial system, the court noted that American servicemen are stationed in states "which have a reputation for harsh laws and savagely operated penal institutions."[156]

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fore no need for a detailed inquiry into service connection: "[T]here is no logical distinction on the ground of 'service connection' between an attack on a local civilian and one on a fellow soldier." 423 F.2d at 1373. The issue, simply stated, is whether a court, after choosing to examine the service connection of overseas offenses, would find that every offense committed overseas met the test. This is remarkably similar to holding that any domestic offenses which could also be charged as "disorders and neglects to the prejudice of good order and discipline" of the armed forces, or as "conduct of a nature to bring discredit upon the armed forces," 10 U.S.C. § 934 (1970), could be under military jurisdiction regardless of its nature. It was just this sort of reasoning which O'Callahan aimed at eliminating. See 395 U.S. at 266, 272-73.

151. 423 F.2d at 1373.

152. Id. at 1374.

153. Id. at 1373-74.

154. Id. at 1374.

155. See id.

156. Id. Before American troops are stationed in any foreign country, the Defense Department conducts a detailed study of its legal system to determine if the fairness requirements of a typical SOFA provision may be met. These "Country Law Studies," e.g., Headquarters, U.S. Forces, Korea, Country Law Study, Korea (1971), are followed by examinations of penal institutions where American prisoners might be incarcerated after conviction by a foreign court. Where these studies indicate deficiencies, steps are taken to "persuade" the country to make the required changes. Such persuasion almost always proves successful. But see Note, Due Process Challenge to the Korean Status of Forces Agreement, 57 Geo. L.J. 1097 (1969).

C. *Special Cases: Civil Administration Courts*

In that rarest of situations where the alternative local court is a branch of the United States judiciary rather than an article III court, civilian and military courts have held that *O'Callahan* does not divest the military of jurisdiction.[157] Until recently, Okinawa was governed by the United States under the terms of a peace treaty with Japan. Thus, it was clearly an occupied zone of a foreign country.[158] Under his power of sovereignty over the islands, President Truman established a dual system of administration, one composed of local civilians (the Ryukyuan Government), and one appointed by the President (the Civil Administration Government). Similarly, dual judicial systems were established, and the courts under the Ryukyuan Government were denied jurisdiction over American military personnel.[159] The courts under the Civil Administration Government could exercise jurisdiction over personnel subject to the Uniform Code of Military Justice "only when the military commander concerned determines not to exercise military jurisdiction . . . ."[160] However, no military commander on Okinawa had ever failed to assert military jurisdiction.[161]

Against this background, the Court of Military Appeals in *United States v. Ortiz*[162] dealt with the post-*O'Callahan* question of whether a serviceman stationed in Okinawa could be tried by court-martial for a non-service related offense. Petitioner conceded that *O'Callahan* was inoperative in foreign countries, but attempted to make it relative by insisting that Okinawa

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157. See text accompanying notes 162-82 infra.

158. See United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963).

159. Exec. Order No. 10,713, 3 C.F.R. 368 (1954-58 Comp.). The provisions for the judicial system are: "Sec. 10: Judicial powers in the Ryukyu Islands shall be exercised as follows:

(a) A system of courts, including the civil and criminal courts of original jurisdiction and appellate tribunals, shall be maintained by the Government of the Ryukyu Islands. These courts shall exercise jurisdiction as follows:

. . . .

(2) Criminal jurisdiction over all persons except (a) members of the United States forces or the civilian component . . . ." Id. at 369.

160. Id. § 10(c) at 370. "Criminal jurisdiction over persons subject to trial by courts-martial under the Uniform Code of Military Justice (10 U.S.C. [§] 801 et seq.) will be exercised by courts other than courts-martial only when the military commander concerned determines not to exercise military jurisdiction under the Uniform Code of Military Justice and specifically indicates to the High Commissioner his approval of referring the case to another court." Id.

161. Williamson v. Alldridge, 320 F. Supp. 840, 842 (W.D. Okla. 1970).

162. 20 U.S.C.M.A. 21, 42 C.M.R. 213 (1970). Ortiz, a Marine Pfc., pleaded guilty before a special court-martial to various offenses among which was the robbery of an Okinawan taxi-driver. Because the crime occurred in an area "outside the confines of any United States military installation," it would apparently have been considered non-service related if committed in United States territory. Id. at 22-24, 42 C.M.R. at 214-16.

belonged in a special category since it was neither part of the United States nor of a foreign country.[163] In denying petitioner's claim, the court looked first to the language of *O'Callahan*:

> [T]he *O'Callahan* opinion tends to indicate that the cognizability of an act in a civilian court established by . . . the administration of [an occupied zone of a foreign country] does not preclude military prosecution of the act, if it constitutes a violation of the Uniform Code of Military Justice.[164]

The court next pointed out that the Supreme Court in *O'Callahan* was concerned only with "functional" jurisdiction.[165] According to the court, courts-martial could be divested of jurisdiction only when an accused serviceman may be tried in a United States civil court.[166] The government contended that the Civil Administration courts were "not the kind of civilian courts contemplated by the Supreme Court in *O'Callahan*."[167] However, the court saw no need to reach that issue and held that because Civil Administration courts in Okinawa lack jurisdiction over servicemen, military courts are the only available forum.[168] With no competing system of justice for which the court might express a preference, the Court of Military Appeals held that military jurisdiction over all crimes committed by servicemen should continue.

The United States District Court for the Western District of Oklahoma is the only civilian court which has faced this unique problem, reaching similar results through slightly different reasoning. In *Williamson v. Alldridge*,[169] a former serviceman who had been convicted by a general court-martial of murdering an Okinawan native filed a petition for habeas corpus, relying chiefly on *O'Callahan*. The petitioner's argument was based on the assumption that *O'Callahan* involved "functional" jurisdiction.[170] He urged that he should have had the benefits of indictment and a jury trial provided for in the Civil Administration courts, which he apparently thought were open and available branches of American justice.[171]

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163. Id. at 22, 42 C.M.R. at 214.

164. Id.

165. Id. at 24, 42 C.M.R. at 216.

166. Id. "Assuming, however, that we attribute too much to the quoted statement [O'Callahan's comment on the crime being committed in United States territory], the civilian courts of Okinawa have no power to try the accused." Id. at 22, 42 C.M.R. at 214.

167. Id. at 23, 42 C.M.R. at 215.

168. Id. at 23-24, 42 C.M.R. at 215-16.

169. 320 F. Supp. 840 (W.D. Okla. 1970). Williamson had been off-base, on leave, and in civilian clothes at the time of the offense. Id. at 841.

170. Id. at 843.

171. Id. at 841. The government admitted and the court found that the Civil Administration courts were "United States civil courts." Id. See O'Callahan v. Parker, 395 U.S. at 273. But see United States v. Ortiz, 20 U.S.C.M.A. at 21, 42 C.M.R. at 213.

The *Williamson* court conceded that Civil Administration courts did provide for indictment and trial by jury but pointed out that these rights emanated not directly from the Constitution, but from the President's powers to administer the Ryukyu Islands.[172] Since the President could have altered whatever rights were given in the Civil Administration courts at his pleasure, the trial of Williamson's case in these courts "would not have secured to him United States Constitutional rights as contemplated by O'Callahan v. Parker."[173] Using reasoning found in *Gallagher v. United States*,[174] *Bell v. Clark*,[175] and *United States v. Keaton*,[176] the court noted that because there could be no denial of constitutional rights where none existed, there was no bar to military jurisdiction.[177]

The court stated, in dictum, that it would permit military jurisdiction even if *O'Callahan* required only the availability of *any* alternative civilian court.[178] Like other courts, the *Williamson* court turned toward result orientation, and refused to believe that the Constitution would require remand of a serviceman to a foreign court. It pointed out that the crimes in *O'Callahan* were " 'committed within our territorial limits' "[179] and explained that "crimes by servicemen in foreign countries [are] distinguishable from the situation in the O'Callahan case."[180] The court was unwilling to remit a serviceman to the local courts even though jury rights were granted.[181] It attempted to compare the "essentially retributive" atmosphere of a military court to the attitude of a local jury composed of a "recently defeated enemy," concluding that in this case military justice actually favored the accused.[182]

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172. 320 F. Supp. at 842.

173. Id. at 843.

174. See text accompanying notes 146-56 supra.

175. See text accompanying notes 111-32 supra.

176. See text accompanying notes 97-109 supra.

177. 320 F. Supp. at 843. The import of this holding—that the protection of the Constitution does not extend to United States citizens when tried in certain courts established by the United States—would seem to have been invalidated by Covert and the other civilian court-martial cases, all of which concerned crimes arising overseas. Those civilians were deemed to be under the protection of the Constitution even though their purportedly justified courts-martial were authorized under provisions other than article III. If the actual provision of the rights themselves is less important than their constitutional foundation, the crimes of which O'Callahan was accused look more like Williamson's. There was no right under the Constitution to an indictment and trial by jury when O'Callahan was charged. Any rights given similarly situated servicemen were gratuitously passed by states, which could, like the President, have removed them at will. See Mercer v. Dillon, 19 U.S.C.M.A. at 272, 41 C.M.R. at 272 (Ferguson, J., dissenting).

178. 320 F. Supp. at 843.

179. Id. at 844, quoting 395 U.S. at 273.

180. 320 F. Supp. at 844.

181. Id.

182. Id. The jury which would have tried Williamson would have been composed of

IV. Overseas Military Jurisdiction Re-evaluated

A. *The* O'Callahan *Case*

If case law can be said to be settled on any point arising out of *O'Callahan*, it would seem to be so on the question of its application overseas. As the above discussion indicates, both civilian and military courts have developed standardized reasoning to dismiss challenges to military jurisdiction over non-service connected offenses abroad. Each court which has had the opportunity to apply *O'Callahan* to crimes committed overseas has first looked to the "basis" of the decision. They have typically held that the essence of *O'Callahan* was the removal from military jurisdiction of those cases which should be tried only after an indictment, and which should receive a jury trial. Where the alternative would have been a trial in a foreign court without constitutional guarantees, the courts ruled that it was a serviceman's privilege to have his trial in an American court-martial, where most constitutional protections applied, rather than in a foreign court.

The lower courts' obvious reluctance to consign Americans to foreign courts for trial was dealt with by the Supreme Court in *Reid v. Covert*,[183] *Kinsella v. United States ex rel. Singleton*,[184] *McElroy v. United States ex rel. Guagliardo*,[185] and *Grisham v. Hagan*.[186] Refusing to elevate result orientation above constitutional principles, the Court in these cases simply noted the problem and passed to the issue of Congress' powers under article I, section 8, clause 14.[187] The finding of inadequate congressional power leading to a lack of subject matter jurisdiction overcame whatever doubts the Court may have had.[188] Even the possibility that the crimes could be of little interest to the foreign authorities, and might therefore go unpunished, was of little significance. Lower courts dealing with *O'Callahan* appear to have given inadequate consideration to the probable real effects of

local Okinawans who might accurately have reflected the community's condemnation of the act charged. As a defeated enemy, the Okinawan jurors might have retained anti-American feelings, or that sentiment might have germinated well after the termination of hostilities. Despite that possibility, however, President Kennedy apparently had sufficient confidence in the judgment and impartiality of the Japanese in 1962 to remand United States dependents and civilian employees to their control. Exec. Order No. 11,010, 3 C.F.R. 587 (1959-63 Comp.), amending Exec. Order 10,713, 3 C.F.R. 368 (1954-58 Comp.) which granted criminal jurisdiction to Civil Administration courts to include "[c]riminal jurisdiction over (a) the civilian component, (b) employees of the United States Government who are United States nationals, and (c) dependents, excluding Ryukyuans, (i) of the foregoing and (ii) of members of the United States forces." Id. § 2(2) at 590.

183. 354 U.S. 1 (1957).

184. 361 U.S. 234 (1960).

185. 361 U.S. 281 (1960).

186. 361 U.S. 278 (1960).

187. See Reid v. Covert, 354 U.S. at 19, 41.

188. Id. at 48-49 (Frankfurter, J., concurring).

a contrary holding. In fact, it appears that the United States servicemen who are tried in foreign courts are treated as well as and, in many cases, more leniently than they would be in a court-martial.[189]

If result orientation is to be avoided, the courts must return to *O'Callahan*, particularly as interpreted in the latest circuit court decisions, *Flemings v. Chafee*,[190] *Schlomann v. Moseley*,[191] and *Gosa v. Mayden*.[192] Each of these cases squarely faced the key question of whether the Supreme Court in *O'Callahan* held that:

> [C]ourts-martial lacked power over the subject matter and person of such a soldier because Congress had no constitutional authority to vest it, or [whether] *O'Callahan* decide[d] that the lack of grand and petit jury procedures (and perhaps other civilian court protections) resulted in the loss of jurisdiction otherwise within the control of congressional grant?[193]

Unlike the cases deciding the overseas application of *O'Callahan*, the courts in *Flemings*, *Schlomann*, and *Gosa* ruled that the military court actually lacked subject matter jurisdiction over non-service related crimes. Particularly in light of *Flemings*, the entire basis of the traditional application of *O'Callahan* to overseas offenses must be re-examined. The questions appear to be threefold: (1) Is *O'Callahan* to be read as denying to Congress the power under article I, section 8, clause 14, to vest jurisdiction over relevant crimes in the military? (2) If *O'Callahan* is to be so read, should it be fully applicable overseas? or, (3) Even if it is not to be so read, can a broad judicial deference to military jurisdiction over crimes committed abroad be justified? It is submitted that the Supreme Court meant subject matter jurisdiction when it repeatedly used that term.

There are several different methods of analyzing *O'Callahan* which support the view that it was a lack of subject matter jurisdiction that dictated the result in that case. The first of these may be described as a literalist's view of the Supreme Court's wording. *O'Callahan* can be viewed as an attempt to define the offenses which Congress could authorize courts-martial to try under article I, section 8, clause 14. In using the term jurisdiction, the *O'Callahan* Court referred to the civilian court-martial cases and other cases which defined the term as the adjudicatory power of courts-martial.[194] Each of these cases relied on article I, section 8, clause

189. N.Y. Times, Jan. 24, 1971, § 1, at 9, col. 1. Compare Department of Defense Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals over United States Personnel 6 (Dec. 1, 1968-Nov. 30, 1969) [hereinafter cited as DOD Statistics] with Table of Maximum Punishments, Manual for Courts-Martial, ¶ 127(c)(6) (rev. ed. 1969). See also Note, 70 Harv. L. Rev. 1043, 1046 (1957).

190. See text accompanying notes 62-73 supra.

191. See text accompanying notes 74-78 supra.

192. See text accompanying notes 79-80 supra.

193. Gosa v. Mayden, 450 F.2d 753, 756 (5th Cir. 1971).

194. See Latney v. Ignatius, 416 F.2d 821, 823 (D.C. Cir. 1969).

14 to limit military jurisdiction. Even though Judge Weinstein in *Flemings* characterized the "jurisdiction" language of *O'Callahan* as showing a "lack of precision" and "not completely lucid,"[195] he thought a "fair reading" indicated that the reference was intended to be to a lack of subject matter jurisdiction.[196]

The three circuit courts which have decided *O'Callahan*'s retroactivity have entertained no doubts that the holding was cast in terms of "traditional" subject matter jurisdiction. The Second Circuit in *Flemings* found this conclusion "unequivocally" illustrated by the holding that "to be *under military jurisdiction*," a crime must be service connected.[197] Any doubt as to the wording of the holding might have been resolved by Justice Harlan's *O'Callahan* dissent with its typically precise formulation of the issue before the Court as "subject-matter jurisdiction of courts-martial."[198] A concern for differences in the entire system of military justice rather than the criticism and possible reform of the military system could prompt a court to view *O'Callahan* as decreeing that cases involving such offenses should be tried by a different court. This, Judge Weinstein explained, involves the classic subject matter jurisdiction of the court.[199]

A second method of concluding that the *O'Callahan* Court was interested in delimiting the article I powers of Congress to legislate for military jurisdiction entails an analysis of the relevance of the jury trial and indictment system to the *O'Callahan* result. A reading of the decision with its frequent references to trial by jury might lead to quick acceptance of the reasoning of the courts which have held *O'Callahan* inapplicable abroad; that is, that *O'Callahan* had as its only function the implementation of a constitutional guarantee of indictment and trial by jury, the absence of which divested military courts-martial of functional jurisdiction. Yet the same "fair reading" invoked by Judge Weinstein seems to confirm his finding that "[*O'Callahan*'s] major thrust is directed to the basic differences between *systems* of military and civilian courts rather than to a few defects of *procedure*."[200] While the majority in *O'Callahan* noted that indictment and jury trial were the "constitutional stakes" of the case,[201] this comment may be read as primarily illustrative of these fundamental differences between military and civilian systems. In fact, the Court listed other "stakes" to illustrate its point.[202] In *Flemings*, Judge Weinstein noted, and a reading of *O'Callahan* confirms, the Supreme Court's concern for "differences

195. 330 F. Supp. at 195-96.
196. Id. at 196.
197. United States ex rel. Flemings v. Chafee, 458 F.2d 544, 549 (2d Cir. 1972).
198. 395 U.S. at 276 (Harlan, J., dissenting).
199. 330 F. Supp. at 196.
200. Id. (emphasis added).
201. 395 U.S. at 262.
202. Id. at 264-66.

with respect to tenure of judges and command influence. . . . differences in the access of the defense to compulsory process. . . . [and] [d]ifferences in evidence and procedure . . . ."[203]

O'Callahan's concern for the provision of indictment and jury trial rights must be read in the light of other holdings on these same rights. Some months prior to *O'Callahan*, the Supreme Court held in *DeStefano v. Woods*[204] that it "[would] not reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968,"[205] making jury trials not constitutionally required in cases tried before that date. O'Callahan was tried by an Army court-martial in 1956—that is, at a time when he had no constitutional right to be tried by a jury in a state court. Moreover, the Supreme Court has never held a grand jury indictment in a state prosecution to be mandated by the Constitution.[206] Thus, if the *O'Callahan* Court was interested only in securing to defendants the benefits of indictments and jury trials, it would have had no grounds upon which to act in *O'Callahan* since Sergeant O'Callahan had no such constitutionally protected rights in 1956. In speaking of jurisdiction, the Court must have had more in mind than a mere procedural deficiency which mandated a preference for civilian courts.

The Supreme Court jury trial cases most frequently mentioned by courts and commentators viewing *O'Callahan* as grand and petit jury oriented, typically recommended reforms in the court's procedures to make them conform to constitutional standards.[207] In *O'Callahan*, however, the Court never even mentioned simple reform of courts-martial to provide jury trials and indictments in some form. The fact that the Court did not suggest methods whereby courts-martial could assume jurisdiction over non-service related crimes[208] strongly suggests that *O'Callahan* should be seen as a simple denial of subject matter jurisdiction.

B. O'Callahan *Abroad*

What would be the impact of the application of *O'Callahan* to overseas crimes? One result could be the rejection of the contention that the powers of Congress to legislate for military jurisdiction over servicemen overseas are greater than they are when Congress legislates for domestic jurisdiction. In *Reid v. Covert*,[209] the Supreme Court denied that the "necessary

203. 330 F. Supp. at 196.

204. 392 U.S. 631 (1968).

205. Id. at 635.

206. See, e.g., Beck v. Washington, 369 U.S. 541 (1962); Hurtado v. California, 110 U.S. 516 (1884).

207. See text accompanying notes 200-06 supra.

208. See United States ex rel. Flemings v. Chafee, 458 F.2d 544, 546 (2d Cir. 1972).

209. 354 U.S. 1 (1957).

and proper" clause enlarged article I, section 8, clause 14 overseas as to civilians.[210] Civilians were held to be immune from military jurisdiction whether found abroad or at home, because the Court decided that it was not necessary to discipline them abroad under the military system.[211] While it may be argued that the need to discipline servicemen stationed overseas is greater than the corresponding powers required over similarly situated civilians, this was not necessarily the unspoken holding of *Reid v. Covert* and its successors. The *Covert* Court could find no justification for lowering its required showing of necessity just because the civilians' offenses were committed abroad. Arguably, the courts should require no lesser showing of military necessity to justify military jurisdiction over servicemen's non-service related offenses committed overseas.

The cases which excluded overseas offenses from *O'Callahan*'s reach have viewed that case as concerned only with indictment and jury trial rights.[212] If the "subject matter jurisdiction" view is accepted, and the "functional jurisdiction" rationale is no longer available, courts must re-examine the problem of overseas jurisdiction by using the test established by *O'Callahan*. In other words, they should test for service connection. In *Relford v. Commandant*,[213] the Supreme Court recommended an examination of at least twelve factors in each case to determine whether or not a crime is service connected.[214] Especially important for consideration in cases involving crimes committed by military personnel overseas is the eighth criterion suggested by the Court in *Relford*; namely, whether or not a civilian court in which the case can be prosecuted is available.[215]

If the civilian court-martial cases are seen as ancestors of *O'Callahan*, the case for requiring the absolute availability of civilian courts is weakened. In those earlier cases, the Supreme Court was issuing a constitutional holding, the effect of which would be to decide in which courts

210. Id. at 19.

211. Id. at 20-21.

212. See, e.g., text accompanying notes 97-109 supra.

213. 401 U.S. 355 (1970).

214. The twelve factors are: (1) the serviceman's proper absence from the base; (2) the crime's commission away from the base; (3) its commission at a place not under military control; (4) its commission within our territorial limits and not in the occupied zone of a foreign country; (5) its commission in peacetime and its being unrelated to authority stemming from the war power; (6) the absence of any connection between the defendant's military duties and the crime; (7) the victim's not being engaged in the performance of any duty related to the military; (8) the presence and availability of a civilian court in which the case can be prosecuted; (9) the absence of any flouting of military authority; (10) the absence of any threat to a military post; (11) the absence of any violation of military property, and (12) the offense normally being among those traditionally prosecuted in civilian courts. Id. at 365.

215. Id.

the crimes would be tried, if at all. In his concurrence in *Covert*, Justice Frankfurter noted that even if foreign courts were the only fora in which to try civilians abroad with the armed forces, "these civilian dependents would then merely be in the same position as are so many federal employees and their dependents and other United States citizens who are subject to the laws of foreign nations when residing there."[216] In his *Covert* dissent, Justice Clark called the possibility of prosecutions of American dependents in foreign courts "an unhappy prospect not only for [the dependents] but for all of us."[217] Justice Harlan, even though he agreed with that sentiment, concurred with the holding that jurisdiction was lacking.[218]

If there is any justification for military trials of overseas non-service related offenses, it must rest on an appeal to the special needs of the military when troops are stationed in a foreign country. The only instance in which the government presented this argument to a court was in *Gallagher v. United States*[219] in the United States Court of Claims. The government's argument had two essential elements: first, without military jurisdiction, relations with the foreign nation could be irreparably damaged; and secondly, the morale, discipline and effectiveness of the forces abroad would be impaired.[220] The government contended that the military commander abroad bears a greater responsibility to the population of the host country than he would to a civilian community surrounding a similar base in the United States. Theoretically, troops are admitted into the host country "as military persons in the service of the United States at all times—whether on duty or off duty."[221] Because of this, the government successfully urged the court to find that the need for assuring the host country that accused servicemen would be held accountable by the military authorities was great enough to justify military jurisdiction.[222]

The argument in favor of allowing a soldier nothing but an on-duty life has been specifically rejected by the Fifth Circuit in *Gosa v. Mayden*,[223] which held that *O'Callahan* necessarily divided a soldier's life between times during which he could be subjected to military jurisdiction

216. 354 U.S. at 48-49 (footnote omitted). Though it may be said that many of the civilians went abroad voluntarily, many of the federal employees were undoubtedly ordered abroad as part of their jobs. They accepted "voluntarily", but was the possible loss of employment which might result from a refusal so much less compelling as to distinguish them from servicemen ordered overseas?

217. Id. at 90.

218. Id. at 76 n.12.

219. 423 F.2d 1371 (Ct. Cl.), cert. denied, 400 U.S. 849 (1970).

220. Defendant's Response 13-15.

221. Id. at 14.

222. Id.

223. 450 F.2d 753 (5th Cir. 1971).

and times when he was immune.[224] A serviceman should not lose this division of status simply because he is outside the territorial limits of the United States.

This approach may be stated in identical terms for American troops stationed in an American community. Non-service related offenses which might inflame sensitivities in the American community would likely be punished by civilian courts, which could reflect the level of community disapprobation of the particular offense much more accurately than could the military. A commander's need to assure an American community of quick military justice has not swayed courts from holding that because local communities are capable of punishing servicemen whose offenses have a relation only to the local civilian community, the crimes must meet tests for service connection. Similarly, foreign countries could be better situated to punish offenses against members of local communities. The SOFA treaties recognize this fact by providing for possible foreign trial of offenses in cases of concurrent jurisdiction, but the consistently high waiver rate[225] has given insufficient evidence upon which to postulate how local prosecutors would act if they knew the accused American was not subject to court-martial by his command.

Consistent application of the service connection test would leave to trial by court-martial such crimes as those committed on base or at a time when the offender was engaged in his military duties. Only those offenses held to lack any connection to military discipline or necessity, such as the rape and robbery committed by Bell and Gallagher, would be excluded from military jurisdiction. For such crimes, if local authorities find that the offenses do not merit trial, that decision should be accepted by the military, as it must be in the United States. Under the applicable SOFA treaties, if *O'Callahan* divested the military of jurisdiction, the non-service connected overseas crimes of military personnel would be punishable only by local civilian courts,[226] just as in the United States.

Prosecutorial discretion would be an equal factor abroad or at home. Local communities could in effect immunize a serviceman by failing to prosecute his non-service related crimes if they were either insufficiently aroused by an offense or failed to believe the evidence warranted a trial. The military could not appeal for military jurisdiction on the ground that it needed to prosecute the soldier to "maintain the smooth community relations necessary to the successful fulfillment of [the commander's] mis-

224. Id. at 757.

225. See DOD Statistics 2.

226. NATO-SOFA, art. VII, ¶ 2(b).

sion"[227] as the government attempted in *Gallagher v. United States*. If a soldier stationed in Germany assaults a German civilian in a local gasthaus, why should the military be heard to complain of the need for a court-martial to assuage the local community's anger? If the German prosecutors know that they are the only ones who can deal with the offense and still decline to charge the serviceman, should their decision be subject to change?

Another theory upon which the government could be expected to base an argument of military necessity is founded on the threat of "weaken[ing] the military defense of the United States and the free world . . . ."[228] The government could contend that countries will be less willing to accept United States troops if the military commanders lack constitutional power to discipline them by courts-martial.[229] This contention ignores the tremendous opposition encountered when NATO-SOFA was negotiated, when European countries wanted to retain jurisdiction over visiting forces, bowing only reluctantly to the United States' demands for extraterritorial military jurisdiction.[230]

The government has also contended that there is a "greater need to maintain discipline among troops stationed in foreign countries,"[231] and that this requires a "broader military jurisdiction" than at home.[232] Even accepting that there is a greater need abroad, this argument is precisely the one rejected under a different guise in *O'Callahan*.[233] The nexus between off-base, off-duty offenses committed by servicemen in civilian clothes against members of the surrounding community and the maintenance of military discipline was held to be insufficient to justify military trial.[234] In *Gallagher*, the government argued that "discipline and morale depend in a large measure upon the impartial, equal and expeditious administration of justice. Morale and discipline would be seriously jeopardized under circumstances where only some members of the military contingent abroad bear the consequence of their criminal conduct."[235] But is this argument particularized for overseas troops?

Even if the Supreme Court adopted the interpretation of *O'Callahan*

227. Defendant's Response 15.
228. Id.
229. Id.
230. See generally Note, 70 Harv. L. Rev. 1043 (1957).
231. Defendant's Response 15.
232. Id.
233. 395 U.S. at 272-74.
234. Id. at 273.
235. Defendant's Response 17.

found in *Gallagher*[236] and similar cases,[237] it could still be argued that the reach of military jurisdiction over all offenses committed abroad is unjustified. There are some acts triable in a court-martial for which an accused serviceman would also be within the extraterritorial jurisdiction of federal courts.[238] Courts would, in these circumstances, have to analyze the service connection of the crime to determine whether military jurisdiction should be allowed.[239] The fact that jurisdiction in a federal district court might attach should divest military courts of power over non-service related crimes under a consistent reading of any current theory of *O'Callahan.*

236. See text accompanying notes 146-56 supra.

237. See, e.g., text accompanying notes 111-32 supra.

238. Although the Supreme Court stated in Sandberg v. McDonald, 248 U.S. 185, 195 (1918), that legislation is "presumptively territorial and confined to limits over which the law-making power has jurisdiction," the question of whether Congressional legislation such as criminal sanctions shall be given extraterritorial effect has been further refined. In United States v. Bowman, 260 U.S. 94 (1922), the Court, in dealing with statutory construction, explained: "Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. . . . But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense." Id. at 98 (emphasis deleted). Certain prohibitory statutes, like the fraud on the government in Bowman, would fall within the latter classification of criminal statutes in which, although they contain "no words which definitely disclose an intention to give [them] extraterritorial effect, . . . the circumstances require an inference of such purpose." New York Cent. R.R. v. Chisholm, 268 U.S. 29, 31 (1925) (citation omitted). See United States v. Flores, 289 U.S. 137, 155 (1933). The Supreme Court has noted that other nations should not object to the exercise of American jurisdiction in these cases since they involve conduct the punishment of which "could not offend the dignity or right of sovereignty of another nation." Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381 (1948) (citations omitted). See also Blackmer v. United States, 284 U.S. 421, 437 n.2 (1932).

239. The test would have to be the same as that applied in the United States, since it could be rendered meaningless if courts adopted the "test" proposed by the government in Gallagher v. United States, 423 F.2d 1371, 1373, cert. denied, 400 U.S. 849 (1970).

The key test of whether the law is to be applied by implication overseas is whether the prohibited acts are "directly injurious to the [United States] government, and are capable of perpetration without regard to particular locality . . . ."[240] Under this test, many acts prohibited by articles of the Uniform Code of Military Justice would be covered by other federal statutes. Reasoning similar to that found in *O'Callahan* could hold them cognizable only in a federal district court. The number of situations arising under these statutes would undoubtedly be limited. The vast majority of crimes committed by servicemen overseas appear to be readily classifiable either as service connected under currently applicable tests for domestic crimes, or as crimes against foreign persons or property. In neither case would the conduct be prohibited by federal statutes. Nevertheless, if military jurisdiction is to be divested by a judicial preference for trial in United States civilan courts whenever possible, courts and the military should consider that courts-martial might not have jurisdiction where the interest of the United States in prosecuting an offense seems to outweigh that of the host country. For example, while on leave from his base in Germany, Private *A* hears that a hated political figure, Congressman *B*, will be staying nearby. *A* takes his privately-owned pistol and unsuccessfully attempts to kill *B*. Is *A* to be charged by the military, by German authorities, or by the United States in a district court pursuant to section 351, Title 18 United States Code?[241]

Since *A*'s conduct is proscribed by federal statute, the possibility of indictment and trial by jury in a district court should give any court a chance to exercise the *O'Callahan* preference for a civilian court by holding that the military is divested of jurisdiction. Germany would undoubtedly have an applicable statute prohibiting simple assaults or assaults with intent to murder, but its interests in prosecution appear outweighed by those of the United States.[242] Even using the reasoning of *Gallagher*, *Bell*, and *Keaton*, the military would be hard pressed to demonstrate a need for the court-martial of *A*.

The case of a Sergeant *C*, who in his spare time runs off counterfeit United States currency in his off-base apartment in Germany, and passes

240. Skiriotes v. Florida, 313 U.S. 69, 73-74 (1941).

241. 18 U.S.C. § 351(c) (1970) provides: "Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section [any Member of Congress or Member Elect] shall be punished by imprisonment for any term of years or for life."

242. There would be concurrent jurisdiction between Germany and the United States. See NATO-SOFA art. VII, ¶ 3. Currently, the identity of the victim, the automatic waiver agreement, and the normal willingness of host countries to allow the sending country to try most offenses not committed solely against its local citizens would militate in favor of military jurisdiction.

them in a non-army, American currency exchange, may also be illustrative. He has violated sections 472 and 473, Title 13, United States Code[243] and undoubtedly, article 134 of the Uniform Code of Military Justice as it assimilates federal criminal statutes.[244] Should *C* be charged in a United States district court or in a military court-martial overseas? A quick if not very well reasoned answer was given by the Court of Military Appeals in *United States v. Goldman*.[245] In *Goldman*, it may be recalled,[246] an accused possessor of counterfeit currency and military payment certificates was charged in a court-martial in Vietnam under article 134. In a post-*O'Callahan* petition for reconsideration, the issue of jurisdiction was raised and rejected by the same two-to-one division of the court as in *Mercer v. Dillon*. Judge Darden viewed the offense primarily as one committed "while on active overseas duty in a zone of conflict,"[247] noting that *O'Callahan* gave Goldman "no support." In his dissent, Judge Ferguson stated:

> [T]his accused should have been returned to the United States and tried in a Federal District Court for the two specifications under Article 134, alleging violation of section 472, Title 18, United States Code (possession of counterfeit military payment certificates and fifty-dollar bills, purporting to be obligations of the United States).[248]

C. *American Military Jurisdiction Abroad: History and Contemporary Construction*

It is surprising that none of the cases yet decided on the overseas application of *O'Callahan* have made reference to the American historical precedents of peacetime overseas courts-martial.[249] The principle of con-

243. 18 U.S.C. § 472 (1970) provides: "Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

18 U.S.C. § 473 (1970) provides: "Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

244. See Manual for Courts-Martial, ¶ 213(e)(1) (rev. ed. 1969). The Manual holds that such offenses "are made applicable under the third clause of Article 134 to all persons subject to the code regardless of where the wrongful act or omission occurred." Id. In the United States, this has not survived O'Callahan, since crimes which do not meet the tests enunciated by Relford and O'Callahan may not be assimilated under article 134.

245. 18 U.S.C.M.A. 516, 40 C.M.R. 228 (1969).

246. See text accompanying note 94 supra.

247. 18 U.S.C.M.A. 516, 517, 40 C.M.R. 223, 229 (1969).

248. Id. at 517, 40 C.M.R. at 229.

249. See generally F. Wiener, Civilians Under Military Justice (1967); W. Winthrop, Military Law and Precedents (1920); Morgan, The Background of the Uniform Code of Military Justice, 6 Vand. L. Rev. 169 (1953).

temporary construction is well established[250] and has been used in particular in ascertaining the meaning of the trial by jury guarantees of the Constitution. The Supreme Court has noted that the words, " 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . . ."[251] In the "landmark" military jurisdiction cases of the nineteen-fifties and sixties, the Supreme Court took whatever guidance was available from historical precedent, particularly that from England.[252] This analytical method is not without its detractors who argue that such reliance is out of place in light of the "practical problem of maintaining discipline among the more than three million men in uniform today."[253] Justice Harlan's dissent in *O'Callahan* denigrated the use of history, noting that it was not binding or limiting on current practice.[254]

It seems at least arguable that if the framers could have anticipated the contemporary composition of the Armed Forces as a group of citizen soldiers, they would not have wanted Congress to possess the power to deny servicemen these fundamental rights given civilians. At the time of the adoption of the Constitution, there was an 800-man army consisting entirely of volunteers and professionals who had more surely chosen their world and its accompanying law than today's draftee.[255] Whether it is advisable today or not, the Supreme Court in *O'Callahan* seemed to give great weight to the historical analysis, and lower courts might have been better advised to examine the subject.

V. Eliminating The Problem: Congressional Proposals For Reform

The proposals for reform of court-martial jurisdiction which have been made, both in and out of Congress, have been of two general types. On the

250. Attention must be "turn[ed] to the words of the Constitution read in their historical setting as revealing the purpose of its framers . . . ." United States v. Classic, 313 U.S. 299, 317 (1941). See also Ex parte Grossman, 267 U.S. 87, 108-09 (1925): "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."

251. Patton v. United States, 281 U.S. 276, 289 (1930), quoting Thompson v. Utah, 170 U.S. 343, 350 (1898).

252. Relford v. Commandant, 401 U.S. at 368; O'Callahan v. Parker, 395 U.S. at 268-71; McElroy v. United States ex rel. Guagliardo, 361 U.S. at 284-86; Reid v. Covert, 354 U.S. at 23-30.

253. Note, 22 Vand. L. Rev. 1377, 1385 (1969).

254. 395 U.S. at 280.

255. See generally Comment, 15 Vill. L. Rev. 712, 720 n.41 (1970). If this argument is to be given weight, the return of an all-volunteer army should mean Congress would have a freer hand under article I, section 8, clause 14. However, it is doubtful that this would be acceptable to the courts.

one hand, legislators and military spokesmen have attempted to persuade Congress to fill the void left by *Covert*, *Singleton*, *Guagliardo* and *Grisham* by extending some form of federal civilian jurisdiction to overseas servicemen and their dependents in criminal cases. On the other hand, measures have been suggested or introduced which would have the effect of limiting the jurisdiction of courts-martial more severely than it arguably is at present. While the former proposals have been made both before and after *O'Callahan*, the latter have generally been introduced after *O'Callahan* as parts of amplified general military justice reform bills supplementary to the Military Justice Act of 1968.[256]

Since the decisions in the civilian court-martial cases, a recurring theme in the drive to save United States jurisdiction over crimes committed by civilians, dependents and employees accompanying the armed forces abroad has been provision for trial by article III federal courts actually sitting in the foreign country in which the crime was committed. Because the Supreme Court has issued no decisions applying *O'Callahan* overseas, discussion of this and other alternatives to military jurisdiction has centered on acquiring jurisdiction over civilians who might escape punishment for offenses committed overseas if, under the terms of the applicable SOFA, the foreign state declines to prosecute. Bringing the typical crimes against persons committed by servicemen and dependents abroad under federal jurisdiction would require expansion of current criminal statutes. At least three methods of doing so have been proposed: (1) assimilation of the District of Columbia penal codes; (2) enumeration of specified overseas federal penal statutes; or (3) extension of those federal penal statutes now applicable to acts committed within the special maritime and territorial jurisdictions of the United States. Although all of these proposals were stimulated by the absence of jurisdiction over civilians accompanying the armed forces, each included provisions for covering servicemen abroad. Presumably, similar interest in reform would be kindled if *O'Callahan* were applied in the future to overseas crimes.

The third alternative is favored by the Defense Department and the armed forces,[257] and it has engendered the most serious discussion. In the first session of the 90th Congress[258] and the second session of the 91st Con-

256. Act of Oct. 24, 1968, Pub. L. No. 90-632, §§ 816-73, 82 Stat. 1335, amending 10 U.S.C. §§ 801-940 (1956) (codified at 10 U.S.C. §§ 801-940 (1970)).

257. Letter from J. Fred Buzhart, General Counsel, Department of Defense, to Representative Emanuel Celler, Chairman of the House Comm. on the Judiciary, Apr. 10, 1972, on file in the Military Law Section, Office of the Judge Advocate General, Department of the Navy.

258. H.R. 11244, 90th Cong., 1st Sess. (1967).

gress,[259] identical bills were proposed to "rectify" the limitation on court-martial jurisdiction imposed by the *Covert-Singleton-Guagliardo* line of cases. The bills proposed that offenses committed by United States soldiers or civilians serving with or accompanying the armed forces be included in the jurisdictional provisions of the special territorial and maritime jurisdiction. The jurisdiction attaches regardless of where the offenses occur. Substantially the same approach was taken by two bills introduced in the Senate during the 91st Congress.[260] Statutes under this jurisdiction currently make criminal most of the serious crimes which commentators have feared might go unpunished if the foreign state is disinterested and the military courts lack jurisdictional power. Adopting these measures would prohibit arson, assault, maiming, stealing, receiving stolen goods, murder, manslaughter, attempting to commit murder or manslaughter, malicious injury to property, rape, carnal knowledge of a female under 16 and robbery.[261]

If any of these jurisdiction-expanding proposals were adopted, and the typical non-service related crimes become cognizable in an article III court, a question would arise over the actual location of the court. An appealing but probably impractical solution would be the establishment of mobile courts to hear cases wherever American forces and accompanying civilians could be found. This solution appeals, if at all, because it offers American-style procedure, to those who might otherwise be tried by military courts-martial or local foreign courts. Apparently, recognition of the practical problems inherent in this concept has discouraged its proponents from pushing seriously for its implementation.

Extensive negotiations were necessary twenty years ago to obtain from the numerous countries of NATO the SOFA rights currently in effect.[262] As offensive to national pride as the SOFA provisions were, the fact that only military jurisdiction could be exercised was reluctantly accepted as necessary.[263] Attempts to escalate our judicial presence in those countries to article III status would more likely than not be met with opposition directly traceable to offended national pride.[264]

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259. H.R. 18857, 91st Cong., 2d Sess. (1970).

260. S. 3188 and S. 3189, 91st Cong., 1st Sess. (1969).

261. See 18 U.S.C. §§ 81, 113, 114, 661, 662, 1111, 1112, 1113, 1363, 2031, 2032, 2111 (1970).

262. Supplementary Hearing on Status of Forces of the North Atlantic Treaty Before the Senate Committee on Foreign Relations, 83d Cong., 1st Sess. 23 (1953); see Hearings on Status of the North Atlantic Treaty Organization, Armed Forces and Military Headquarters Before the Senate Committee on Foreign Relations, 83d Cong., 1st Sess. 22 (1953).

263. Note, 70 Harv. L. Rev. 1043, 1048-67.

264. Proceedings of the ABA Sect. of Int'l & Comp. L., Report of the Comm. on Status

Even more pragmatic objections exist to the concept of the "roving" article III court. There would necessarily be time lags of varying duration before one of the "circuit-riding" judges arrived at the base to sit for motions at any article 39(a) session,[265] and for trial. It would be asking too much of Congress to believe that it would provide funds for large numbers of life-tenured roving federal judges whose jurisdiction would be geographically unlimited, but confined to cases arising overseas and involving servicemen, dependents or employees. In addition to the delay involved in importing a federal district judge into a military installation, the empaneling of a jury might prove difficult.[266] Excluding the extreme case of a military base in Antarctica, which would have insufficient personnel capable of withstanding challenges by trial counsel based on their knowledge of the case or of the accused, the larger bases might pose equally serious problems in obtaining grand and petit jury members. This would be true either if military personnel were excluded from jury lists, or, assuming servicemen were eligible, if the requirements of duty prevented sufficient numbers from being spared for jury service.

It has been argued that an accused might solve many of the problems incurred in securing a jury trial by waiving such a right in favor of a trial by judge alone[267] or by a court-martial.[268] Waiver of the right to trial by jury, to be valid, must be free and knowing.[269] The servicemen's alternative of extended incarceration or accumulation of "bad time" (time not counted in an enlistment period) might deter many servicemen from exercising their rights, and the choice would be invalidated as coercive.[270] As to waiving civilian trial in favor of a military court-martial, the choice seems impermissible, since lack of jurisdiction over the subject matter can never be waived.[271] Thus, this alternative appears doomed in advance unless *O'Callahan* is read at its narrowest.

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of Forces Agreements 120 (1959); see Note, Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas, 71 Harv. L. Rev. 712, 725 (1958) [hereinafter cited as Criminal Jurisdiction]; United States ex rel. Guagliardo v. McElroy, 259 F.2d 927, 939 n.26(d) (D.C. Cir. 1958) (Burger, J., dissenting), aff'd, 361 U.S. 281 (1960).

265. Under article 39 of the U.C.M.J., 10 U.S.C. § 839 (1970), a military judge may call for sessions to settle questions of law and evidence, to hear pleas, etc.

266. Sutherland, The Constitution, The Civilian, and Military Justice, 35 St. John's L. Rev. 215, 223 (1961). But government employees who would otherwise qualify in the United States could apparently be empanelled overseas without constitutional problems.

267. Id.

268. 44 Tul. L. Rev. 417, 425 (1970).

269. Patton v. United States, 281 U.S. 276 (1930).

270. See Schick v. United States, 195 U.S. 65, 71 (1904).

271. Mitchell v. Maurer, 293 U.S. 237, 244 (1934); Mansfield, C. & L. Mich. Ry. v. Swan, 111 U.S. 379, 384 (1884).

The unavailability of trained and qualified civilian counsel would pose a delaying and possibly insurmountable problem to the article III court. Though some American attorneys have followed servicemen overseas to represent them in foreign courts in criminal and martial actions, larger numbers would be required to represent the new classes of defendants who would be added to federal jurisdiction. Even if the military changed its current policy of denying its JAG Corps officers the option of representing servicemen in criminal matters in most American and all foreign civilian courts, the accused servicemen and civilians might successfully argue that their constitutional right to counsel was being abridged because of the inadequate choice of attorneys.

Problems not unique to the imposition of article III courts would likewise be created. As in military courts-martial, compulsory process would not extend to foreign civilians who had witnessed the offense, and other foreign nationals who, would almost certainly be the victims of the alleged crimes.[272] The federal rule[273] excluding depositions except at the insistence of defendants would only aggravate problems of production of evidence and witnesses, and the entire constitutional question of trial in the vicinage would be raised. In courts-martial, trials frequently occur thousands of miles from the locale in which the crimes allegedly occurred.[274]

The impracticability of establishing roving article III courts would present no more serious a problem than a proposal envisioning return of military (and civilian) offenders to the United States for trial in domestic article III courts.[275] The availability of a forum and a judge would no longer be a problem since the accused could be tried in whichever district he was first brought by the government.[276] However the difficulty of obtaining witnesses for the government and the defense would seem to preclude its serious consideration. Foreign nationals could certainly not be compelled to leave their country and travel thousands of miles to testify in a United States trial, even if transportation were provided at government expense. Compulsory process simply does not reach that far.[277] Even assuming that major government witnesses could be per-

272. 107 U. Pa. L. Rev. 270, 273 n.30 (1958).

273. Fed. R. Crim. P. 15(a).

274. Cf. United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954), wherein trial by court-martial occurred in Maryland even though the alleged offenses occurred in Korea.

275. United States v. Keaton, 19 U.S.C.M.A. 64, 67, 41 C.M.R. 64, 67 (1969). See also Gallagher v. United States, 423 F.2d 1371, 1374 (Ct. Cl.), cert. denied, 400 U.S. 849 (1970).

276. 18 U.S.C. § 3238 (1970); see U.S. Const. art. III, § 2.

277. United States v. Hofmann, 24 F. Supp. 847, 848 (S.D.N.Y. 1938) (dictum); cf. Georgia v. Pennsylvania R.R., 324 U.S. 439, 467-68 (1945); Ex parte Graham, 10 F. Cas. 911, 912 (No. 5,657) (C.C.E.D. Pa. 1818).

suaded to make the trip, the already considerable expense would be exacerbated by defense requests for witnesses, making the cost of domestic trials prohibitive.[278] Alternatively, defendants might be able to unduly influence the government's prosecutorial discretion by entering not-guilty pleas along with demands for numbers of foreign witnesses. These factors could deal a serious blow to the uniform application of the law, since the government might choose to prosecute only the most serious cases, and within that category, only the ones in which convictions were certain.[279]

National sensitivities would be even more offended by this procedure than by the upgrading of the courts which try servicemen in the locale to article III status. Currently, the members of the community and the victims are at least able to see the offender brought to trial, and in almost all cases without delay. The transfer of the case to the United States, as well as the probability of requiring victims to travel abroad, would eliminate whatever value there may be to a quick and visible punishment of offenses by visiting forces against the local populace. If the imposition of article III courts on the soil of a foreign state is likely to raise problems of renegotiating SOFA's, the complete removal of the offender would engender many more difficulties.[280] It seems probable that the waiver rate in host countries would drop sharply, at least in those cases of concurrent jurisdiction serious enough to be removed to the United States. In short, both alternatives which have been advanced during the last ten years to "correct" the jurisdictional defects in courts-martial of civilians are equally impracticable when applied to servicemen stationed overseas.

Long before the Supreme Court began to limit court-martial jurisdiction, the American Legion was responsible for the introduction of a bill to eliminate military jurisdiction over all civilian-type crimes, whether committed abroad or at home.[281] More recently, the legislators who had hoped in 1968 for a comprehensive overhaul of the military justice system have sought to enlarge upon the reforms of the 1968 Act to achieve their aim. Within three years, five major bills were introduced calling for major mili-

278. A defendant's right to compulsory process would certainly not be cut back from its current form. See U.C.M.J. art. 46, 10 U.S.C. § 846 (1970). See generally Manual for Courts-Martial, United States, ¶ 115(d) (rev. ed. 1969). Military personnel would, if made available, be transported at government expense. It seems arguable that fundamental fairness would require the government to transport foreign nationals needed by the defendant if he could not (as would be expected) pay for them himself. See Criminal Jurisdiction, supra note 264, at 724.

279. Criminal Jurisdiction, supra note 264, at 724.

280. Girard, The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis, 13 Stan. L. Rev. 461, 509-10 (1961).

281. H.R. 3455, 86th Cong., 1st Sess. (1959).

tary justice reform. The bill most limited in scope and least relevant to this analysis was introduced by Senator Sam Ervin in 1969. This bill proposed that the protections available in administrative discharge proceedings be enlarged.[282] Congressmen Charles M. Whelan Jr. and Charles M. Price have introduced bills paralleling the one introduced by then Senator Tydings. All of these bills envision reform of the commander's authority to select members and judges.[283] Their chief, if not only target, is the oft-repeated evil of command influence.

The three proposals contemplating extensive changes in military justice along with changes in jurisdiction relevant to offenses committed overseas, are those of Senators Birch Bayh[284] and Mark Hatfield,[285] and Congressman Charles Bennett.[286] Of the three, the Bayh bill makes the least substantive change in the military's jurisdiction to try offenses wherever committed.[287] The only provision dealing with possible changes in jurisdiction is the bill's call for the appointment of a committee charged with conducting a "thorough study" and within one year making recommendations to the President and Congress on, among other things, "the desirability of transferring to the district courts of the United States jurisdiction of certain cases involving desertion and other unauthorized absences from the armed forces . . . ."[288]

The main thrust of the Bayh bill is especially directed toward enlarging procedural safeguards in the military justice system. However, the thrust of his argument, and the effect of his bill, stand to be undercut if his committee reports favorably on the above proposition and if affirmative action is taken by Congress. As Senator Bayh noted in a statement accompanying the bill, "at least 85 percent and perhaps as many as 90 percent [of military prisoners] are men who have either absented themselves without leave or deserted."[289] The transfer of these cases to district courts would entail enough substantive problems to give the committee pause for thought. Senator Bayh believes current court decisions, particularly *O'Callahan*, go far enough to allow him to conclude:

> Under [the existing limitation on courts-martial jurisdiction] and with the hope of enactment of significant reforms, I do not believe that further curtailment of court-martial jurisdiction over civilian-type offenses is appropriate at this time.[290]

282. S. 1266, 91st Cong., 1st Sess. (1969).

283. Whalen: H.R. 6901, 92d Cong., 1st Sess. (1971); Price: H.R. 2196, 92d Cong., 1st Sess. (1971); Tydings: S. 3117, 91st Cong., 1st Sess. (1969).

284. S. 1127, 92d Cong., 1st Sess. (1971).

285. S. 4168-78, 91st Cong., 2d Sess. (1970).

286. H.R. 579, 92d Cong., 1st Sess. (1971).

287. S. 1127, 92d Cong., 1st Sess. § 805 (1971).

288. Id. § 1259 Sec. 4(a)(3).

289. 117 Cong. Rec. 5310 (1971).

290. Id. at 5310-11.

Senator Hatfield agrees with current interpretations of *O'Callahan* which hold that offenses committed overseas are somehow different and must remain under military jurisdiction. In introducing his series of bills to reform military justice, the senator stated that "except in cases which are military by nature, or crimes of a *civilian or military nature committed in a foreign country* by military personnel, military courts should not have jurisdiction; Federal courts should."[291] Hatfield emphasized the fact that jurisdiction of military courts is different and more limited for crimes "committed within the territorial limits of the United States."[292] In fact, his bills would specifically provide for military trial of crimes committed by military personnel in areas outside the United States by dividing the world into military judicial circuits and setting up methods for the detailing of military judges and counsel and conducting pretrial investigations, courts-martial and the review process.[293]

Under Senator Hatfield's proposal,[294] the military would retain jurisdiction over all crimes committed by American servicemen abroad, while military courts would retain jurisdiction over only eighteen typically military offenses within United States territory.[295] The other thirty-seven offenses in the Uniform Code of Military Justice, among them such serious military-type crimes as mutiny[296] and aiding the enemy,[297] and such serious civilian-military crimes as larceny[298] and murder,[299] would be transferred to federal district courts even if, as in *Relford*, they occurred on a military base or contained other indicia of service connection.

The aim of the Hatfield bill seems to be the provision to servicemen, wherever stationed, of the maximum number of procedural safeguards.[300] Senator Hatfield has chosen to upgrade military safeguards while retaining military jurisdiction overseas. It would seem Senator Hatfield would favor returning military defendants charged with serious, non-service related overseas offenses to the United States for trial in article III courts, just as he provides for servicemen stationed in this country.

The bill which makes the most differentiation between offenses committed within and outside of the territory of the United States was in-

291. 116 Cong. Rec. 27217 (1970) (emphasis added).
292. Id.
293. See S. 4168-78, 91st Cong., 2d Sess. (1970).
294. S. 4178, 91st Cong., 2d Sess. (1970).
295. Jurisdiction would be maintained for offenses chargeable under articles 83, 84, 85, 86, 87, 90, 91, 92, 93, 95, 96, 97, 98, 107, 108, 109, 112, 113, 115 of the U.C.M.J.
296. U.C.M.J. art. 94, 10 U.S.C. § 894 (1970).
297. Id. art 104, 10 U.S.C. § 904 (1970).
298. Id. art. 121, 10 U.S.C. § 921 (1970).
299. Id. art. 118, 10 U.S.C. § 918 (1970).
300. See 116 Cong. Rec. 27218 (1970).

troduced by Congressman Bennett.[301] This bill proposed that the jurisdiction of Upper (general) and Lower (special) courts-martial over crimes vary according to whether the crimes are committed abroad or not. Upper courts-martial would be given jurisdiction over ten of the more serious military-type offenses regardless of where they are committed.[302] Nine other serious but civilian-type offenses would be triable by upper courts-martial only if committed outside the territorial jurisdiction of the United States.[303] The proposed jurisdiction of lower courts-martial would be understandably broader, but a sharp delineation is retained between crimes cognizable in courts-martial without regard to the location in which they are committed and a longer list militarily cognizable only when committed abroad. Lower courts would be limited to trying defendants accused of less serious military-type offenses,[304] and to trying defendants for less serious civilian-type offenses when committed outside United States jurisdiction.[305] The bill retains the controversial article 88,[306] but transfers jurisdiction over it to United States district courts, regardless of where its violation occurs.[307] District courts would have jurisdiction over any violation of articles 109 through 134 inclusive, but only when committed within the territorial limits of the United States.[308]

The Bennett bill envisions trial by civilian court for civilian-type crimes committed in the United States and proscribed by the Uniform Code of Military Justice's current punitive articles. Military jurisdiction is granted over offenses committed within the United States only for military-oriented crimes in which civilian courts would have little interest and

301. H.R. 579, 92d Cong., 1st Sess. (1971).

302. Jurisdiction exists anywhere for volation of articles 85, 92, 93, 94, 99, 100, 102, 103, 104, and 106. See H.R. 579 at § 818.

303. Articles 118, 119, 120, 122, 123, 124, 125, 126, and 129. H.R. 579 at § 818.

304. Articles 15, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 89, 90, 91, 95, 96, 97, 98, 101, and 105 may be charged anywhere. H.R. 579 at § 819.

305. Articles 88, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 121, 127, 128, 130, 131, 132, 133, or 134 are cognizable only outside United States territory. H.R. 579 at § 819.

306. "Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of the Treasury, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct." 10 U.S.C. § 888 (1970). See generally United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967); Kester, Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice, 81 Harv. L. Rev. 1697 (1968).

307. The bill does not explain how this provision would function if the article were violated outside United States territorial limits. Would the offender be returned to this country for trial?

308. H.R. 579 at § 820.

expertise. Overseas, however, the military would be free to try servicemen for every crime currently prohibited except offenses in article 88. Surely Representative Bennett and the drafters of his bill must have given consideration to the pragmatic problems of returning servicemen to the United States for trial when the charge is a violation of any of the articles over which jurisdiction is denied when committed within the United States. The bill's safeguards go far toward equalizing protections in military and civilian trials, but inclusion of the district court's exclusive jurisdiction over article 88 is a tacit admission that the provisions of the bill stop short of true equality. Seemingly as an afterthought, Congressman Bennett included in his bill the same idea for an appointed committee to study subsequent changes in military justice as did Senator Bayh.[309] As proposed in the Bayh bill, the committee would examine and report within one year to the President and Congress on the feasibility of transferring AWOL and desertion cases to district courts. Although Congressman Bennet would deny that "military necessity" justifies continuing military jurisdiction over many service connected crimes,[310] he feels that there should be a year's hiatus before assaulting the military system.

Passage of these pending bills would not hold out much hope for the serviceman accused of a crime abroad which, if committed at home, would be "non-service connected."[311] Unless the charged violation is of article 88 (and the assumption made that Congressman Bennett's bill was passed), current proposals for reform do no more and no less than courts which have evaluated the problem. If reform and further limitation over military jurisdiction overseas is to come, it is to the courts and not to Congress that reformers and disgruntled servicemen should look.

VI. CONCLUSION

The Supreme Court's denial of certiorari in *Gallagher* and *Hemphill* might seem to militate against the success of future challenges. The "absolutist" reading of *O'Callahan* may be less appealing to a court faced with United States servicemen being tried by foreign courts instead of service-

309. Id. § 4(a).

310. In Bennett's bill, lower courts are prohibited from trying servicemen charged with such service connected crimes as being drunk on duty (article 112), unless committed abroad. Bennett must believe that the necessity of maintaining discipline and order in the services can be met in the United States by civilian court prosecutions, or lesser forms of administrative sanctions.

311. This assumes that servicemen would prefer not to be tried in a court-martial wherein procedural and review rights at least partially conform to constitutional standards. Most cases have seemed to place servicemen in this position. However, it must be remembered that the servicemen are all attacking their prior military convictions, and would probably not face an immediate foreign trial if their petitions succeed.

men whose final appellate review was completed prior to the date of the *O'Callahan* decision. A fair inference from the Court's omission of a stronger and more specific disclaimer relating to the perceived problem might be that the limitation was not thought particularly improper.

Another possible explanation for the Court's refusal to grant certiorari in the two cases is the fact that both involved questions of retroactivity and overseas application, and the Court may have preferred to limit its consideration to a case supposedly requiring a decision on the former issue, as it indicated when it granted certiorari in *Relford*.

Of more significance may be the Supreme Court's purported departure from open hostility toward military justice.[312] The unanimous opinion in *Relford* included no harsh words against military courts, even from Justice Douglas. The "spirit of *O'Callahan*" which has been seen as a tendency against continuing court-martial jurisdiction in many areas may be a thing of the past. The Burger Court's views on military justice can only be surmised, but the decision which will resolve the conflict between the circuits on *O'Callahan*'s retroactivity[313] should provide a clue to the future direction of the Court. Where the "jurisdictional rationale" of *O'Callahan* is used, as this article argues it should be, and regardless of whether retroactivity is granted or denied, the same logic, equally applied, could lead to a re-evaluation of the numerous holdings on *O'Callahan*'s applicability overseas.

312. See, e.g., Note, Military Jurisdiction: Courts-Martial Jurisdiction over Offenses Committed on Base in Violation of Security of Person or Property Upheld, 26 JAG J. 131, 133-34 (1971).

313. On June 20, 1972, the Supreme Court granted certiorari in Flemings v. Chafee and Gosa v. Mayden and presumably will decide the retroactivity of O'Callahan v. Parker. The Court consolidated the arguments in these two cases. Gosa v. Mayden, 450 F.2d 753 (5th Cir. 1971), cert. granted, 407 U.S. 920 (1972) (No. 71-6314, 1972 Term); Flemings v. Chafee, 458 F.2d 544 (2d Cir.), cert. granted sub nom. Warner v. Flemings, 407 U.S. 919 (1972) (No. 71-1398, 1972 Term).